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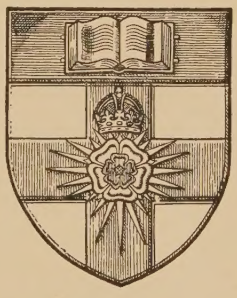

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LAW REPORTS.

Division I.—Chancery.

CASES

DETERMINED BY THE

CHANCERY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

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Edited by **GEORGE WIRGMAN HEMMING, Q.C.**

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CASES

DETERMINED BY THE

CHANCERY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

CHIEF JUDGE IN BANKRUPTCY

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE CHANCERY DIVISION AND THE CHIEF JUDGE

AND IN

LUNACY.

GREAT AUSTRALIAN GOLD MINING COMPANY *v.* MARTIN.

C. A.
1876
V.-C. M.
Nov. 30.
C. A.
1877
Jan. 11;
Feb. 2.

[1876 G. 9.]

Practice—Service out of the Jurisdiction—Rules of Court, 1875, *Order* XI., *rr.* 1, 1*a*, 3(*l*)

The evidence required by Rules of Court, 1875, Order XI., rule 3, of the grounds on which an application for service of a writ out of the jurisdiction is applied for must be evidence to prove that there is a cause of action, and that such cause of action arose within the jurisdiction; but the Court will not allow such evidence to be controverted, or go into the merits of the case.

A company registered in *England* for working a mine in *Australia* brought an action against persons connected with the formation of the company, making a *primâ facie* case for relief in respect of acts within the jurisdiction.

The Court refused to make an order under Order XI., rule 1, for service of

1 Ex WN (1875) 107 II. 34 & W N (1876) 7 H 239

Re Fowler Bosanko 20 CLD 240 CA

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Statement.

the writ in *Australia* upon one of the Defendants, who was a British subject, until the Plaintiffs produced an affidavit by their secretary that he was informed and believed that there was a good cause of action within the jurisdiction.

THIS was a motion on behalf of the Defendant, Sir *James Martin*, Knight, that an order dated the 10th of January, 1876, whereby it was ordered that the Plaintiffs should be at liberty to issue a writ of summons against the three Defendants, Sir *J. Martin*, *Charles J. Nichols*, and *Edgar H. Minton*, and whereby it was also ordered that the Plaintiffs should be at liberty to serve such writ with a copy of the order on the Defendant, Sir *J. Martin*, at *Sydney*, in *New South Wales*, might be discharged, and that the Plaintiffs might be ordered to pay the costs of this application, and such other costs as had been occasioned by the order having been obtained and the writ having been served upon the Defendant.

The action was brought by the *Great Australian Gold Mining Company* against Sir *J. Martin*, Knight, Chief Justice of *Sydney*, *New South Wales*, *Charles J. Nichols*, and *Edgar H. Minton*. The indorsement of the writ stated that the claim was for delivery up to the Plaintiffs of all the debentures and shares in the Plaintiff company obtained by the Defendants respectively from the Plaintiffs by the fraud and conspiracy of the Defendants; and for consequential relief; and for delivery up to be cancelled of the contract between the Plaintiffs and the Defendants, *Charles J. Nichols* and *Edgar H. Minton*, for purchase of the mine lease, which contract was obtained by the fraud of those Defendants from the Plaintiff company; and for damages sustained by the Plaintiffs in consequence of the fraud and conspiracy of the Defendants respectively; and for repayment to the Plaintiffs of all moneys received by the Defendants respectively on account of such contract, and from the aforesaid shares and debentures; and for an injunction to restrain the Defendants respectively from taking any proceedings for the winding-up of the Plaintiff company; and for general relief in respect of the matters aforesaid.

In support of the application for the writ, an affidavit was filed by Mr. *Appleyard*, the secretary of the company, which merely contained a statement of the claim made by the Plaintiffs, following

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the words of the indorsement of the writ; and also stating that the Defendant, Sir *J. Martin*, was a British subject residing out of the jurisdiction of the Court at *Sydney*, in *New South Wales*, and that it was most probable that he was to be found there, for the purpose of being served with notice of the writ proposed to be issued.

Statement.

The Plaintiffs filed their statement of claim on the 3rd of May, 1876, in which they stated at considerable length the circumstances under which the company was projected at *Sydney* and formed in *London*, and alleged, among other things, that the Defendant, Sir *J. Martin*, who was one of the trustees of the company, had signed the prospectus, and put his initials to each paragraph, and had concurred in its being issued in *England*, and that the prospectus contained fraudulent misrepresentations as to the value of the mine which the company proposed to purchase and work; and also that he had stipulated with the promoters that he should receive pecuniary consideration in cash and shares for the use of his name as trustee.

In support of the motion for discharging the writ, an affidavit was sworn by Sir *J. Martin* on the 4th of August, stating that he had nothing to do with the promotion of the company, and had never had any shares, or debentures, or other interest in it; that he had signed the prospectus merely as trustee of the funds, jointly with two other persons; that alterations were made in the prospectus after it had been sent to *England* without his knowledge, and of which he did not approve, and that when he heard of them he had at once repudiated all connection with the company, and that he had never received any benefit from his trusteeship.

The motion was heard before Vice-Chancellor *Malins* on the 30th of November, 1876.

Argument.

Higgins, Q.C., and *Sangster Green*, for Sir *J. Martin*:—

The ground of this motion is that the Court has no power to make an order for service abroad, in a case like this, under the present practice. The question depends on Order XI., rule 1.

The old Court of Chancery had power to entertain a suit where the Defendant was out of the jurisdiction of the Court; but that is altogether altered by the new rules. The new rule amalgamates to some extent the rule under the *Common Law Procedure Act*

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and the rule in the Court of Chancery. It extends the former and restricts the latter. The case of *Hawarden* v. *Dunlop* (1) shews that it is in the discretion of the Court. The Court cannot make such an order except upon an affidavit shewing grounds for the application. The affidavit in this case is a mere repetition of the writ, so there is no evidence of any grounds for the action, and there has been no compliance with the 3rd rule of Order XI. Vice-Chancellor *Kindersley's* judgment in *Hawarden* v. *Dunlop* is precisely in point, because it shews that the Court will discharge an order of this nature if it sees, upon hearing the arguments on both sides and reading evidence, that the order ought not to have been granted. The case of *Maclean* v. *Dawson* (2) is to the same effect. The affidavit sworn by Sir *J. Martin* is a complete answer to the charge made against him. All he consented to do was to act as stakeholder of the money, together with two other persons, until the company was formed and proper trustees appointed to receive the money. He only signed the prospectus as such trustee, and is not answerable for the truth of the statements contained in it. Moreover, it was altered without his knowledge, and he at once repudiated all connection with the company. *Casey* v. *Arnott* (before the Common Pleas Division, November 4, 1876), supports our argument, and also *Preston* v. *Lamont* (3). Similar cases in the Common Law Courts are collected in Mr. *Griffiths'* book (4), where the question is discussed whether the entire cause of action must have been within the jurisdiction or not.

Glasse, Q.C., and *Freeling*, for the company:—

In the cases of *Hawarden* v. *Dunlop* and *Maclean* v. *Dawson* (5) the Court went upon the statements in the bill. It is true that by Order XI., rule 3 (6), there must be an affidavit in support

(1) 2 Dr. & Sm. 155.
(2) 4 De G. & J. 150. 5 Jur. N.S. 663
(3) 1 Ex. D. 361.
(4) Page 131.
(5) Also reported in the Court below in 27 Beav. 25.
(6) Order XI., rule 3, is as follows: "Every application for an order for leave to serve such writ or notice on a Defendant out of the jurisdiction, shall be supported by evidence, by affidavit or otherwise, shewing in what place or country such Defendant is or probably may be found, and whether such Defendant is a British subject or not, and the grounds upon which the application is made."

(4) 2 C.P.D. 24.

of an application for leave to serve the writ upon persons out of the jurisdiction, shewing the grounds upon which the application is made. That does not mean that the affidavit is to be all the evidence in the cause; it means that the affidavit is to shew the nature of the relief sought, and that the cause of action, as alleged, is within the jurisdiction. Our allegation is that the company was defrauded in *England* by representations in which this Defendant concurred. All this may be disproved at the hearing, but the Court cannot go into it now. Vice-Chancellor *Kindersley* said in *Hawarden* v. *Dunlop* (1) that the case should be gone into *de novo* upon an application to set aside an order of this nature, and we ought therefore to be allowed to go into the facts set out in the statement of claim.

[MALINS, V.C.:—I am inclined to think, as a matter of practice, that the statement of claim put in after the application for leave to serve the writ, should not be read; but as Sir *R. Kindersley* seems to have thought otherwise, I do not feel myself at liberty to reject it.]

Lord Justice *Knight Bruce* said, in *Maclean* v. *Dawson* (2), that it was incumbent upon the Court, in a case like this, to look at the statements in the bill, though they might not be supported by evidence.

Higgins, in reply:—

Whatever ground there may be for the issuing of the writ, and for leave to have it served out of the jurisdiction, it must be verified by the oath of the party applying for it. The statement of claim is not verified by oath, and it may be recalled and altered to-morrow. We have never seen it, and therefore we stand upon the evidence before the Court.

MALINS, V.C.:— Judgment, V.-C. M.

This case raises a question of practice under the new rules which is of very considerable importance, and as to which it is not very easy to construe the Orders which have been drawn up. The writ was issued in January last, and one of the Defendants,

(1) 2 Dr. & Sm. 155. (2) 4 De G. & J. 156. 5 Jur. NS 663.

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Judgment, V.-C. M.

Sir *James Martin*, being resident in *Australia*, an application was made to the Chief Clerk on affidavit for leave to serve the writ upon him in *Australia*. I cannot say that the writ distinctly states what are the grounds upon which the application is made. The Plaintiffs here are a company registered in *England* in 1873, and they complain of the conduct of the Defendants. I must treat the case just the same as if one of the persons was *John Smith*, a person in the most humble station of life; and I cannot take any notice that one of them happens to be the Chief Justice of the colony. The statement is, that the company has sustained injury by the fraudulent conduct of the Defendants, and I need not repeat that which I have said already, to relieve the anxiety of Mr. *Higgins*, that, of course, the Court assumes that the charge is utterly groundless; that there will be a total failure to prove it; and, for the purpose of my decision, I assume that, when this case comes to a hearing, the claim will be dismissed with costs. But I apprehend the true and rational construction of this Order, before and since the new system, is this, that, if a case is stated which, if proved, the Court sees will entitle the Plaintiff to the decree, that is a case in which the Defendant, against whom the relief is sought, being a British subject, resident abroad, should be served out of the jurisdiction. If, on the other hand, the Court sees that the claim made is such as was put forward in the case of *Maclean* v. *Dawson* (1), then it will decline to act. Lord Justice *Knight Bruce* said in that case: "I apprehend, however, that it is incumbent on the Court to look into the bill, though not supported by evidence; for it is easy to conceive the case of a bill so plainly absurd, or relating to such a subject-matter, or to a controversy between persons so circumstanced, that the Court ought at once to decline to act." I adopt that; and, if I saw by the statement here that it was so absurd that no relief could ever be given upon the claim, even if the facts stated in it were proved, then I should say I could not give leave for any man to be troubled with the service of a writ for such an object, and I should refuse the application. Lord Justice *Turner* says in the same way (2): "I wish, however, to state distinctly that, in my opinion, the Court has a discretion in these cases, and

(1) 4 De G. & J. 150, 156. (2) 4 De G. & J. 157.

that I consider it to be the duty of the Court to look into the bill for the purpose of satisfying itself how such discretion ought to be exercised. The discretion ought, in my judgment, to be as carefully exercised upon an application to discharge an order allowing service out of the jurisdiction, as upon the original application for the order."

Therefore I think I am not at liberty to disregard the fact, now that the application is made, adopting the rule laid down by Sir *Richard Kindersley*, in the case of *Hawarden* v. *Dunlop* (1), that when an application is made to discharge the writ, which is the present case, the Court must treat it as an application *de novo* to issue the writ; and I treat it, therefore, just the same as if this, instead of being an application by Mr. *Higgins*, on the part of the Defendant Sir *James Martin*, to discharge the order, were an application by the Plaintiffs now for an order; and if the application were now made for an order, what should I have to look at? I should look at the bill, or that which is substituted for it at present, a statement of claim, to see whether it states a case which, if proved, would entitle the Plaintiff to the relief. From the statements made to me by Mr. *Glasse*, I assume, at all events, there is a fair case to be tried between the parties. It is a case, in which, if it relates to any transaction within the jurisdiction falling within the rule, I take it to be quite clear that the discretion of the Court ought to be exercised in giving leave to serve a Defendant, who is a British subject out of the jurisdiction, with the writ. If, therefore, it falls within the rule, I apprehend those are the principles upon which I ought to act; and there can be no doubt, therefore, what I ought to do in the case. But it is said it does not fall within the 1st rule of Order XI. Now, in order to determine that question, I must see what the nature of the relief asked is. As I have already said, this is a company registered in *England* in 1873; and the statement is that it has been injured by the improper or fraudulent conduct of the Defendants, or some of them, and that fraud committed by the Defendants, although resident abroad, refers to acts which they did or caused to be done in *England*, namely, by drawing the funds out of their proper custody in *England* for an improper purpose. That,

(1) 2 Dr. & Sm. 155.

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I understand Mr. *Glasse* to state, is the nature of the case made. This, then, is the rule: "Service out of the jurisdiction of a writ"—evidently, therefore, not service of the statement of claim, but of the original writ—"Service out of the jurisdiction of a writ of summons, or notice of a writ of summons, may be allowed by the Court or a Judge whenever the whole or any part of the subject-matter is land or stock, or other property situate within the jurisdiction"—it is admitted by Mr. *Glasse* that that part of the rule does not apply—"or any act, deed, will, or thing, affecting such land, stock, or property"—that does not apply—"and whenever the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, was made or entered into within the jurisdiction"—I do not think it seems to fall within that, because it is not made or entered into within the jurisdiction—"and whenever there has been a breach within the jurisdiction of any contract wherever made"—that seems to be the case—where there has been a breach within the jurisdiction, that is, withdrawing funds from *England* which ought to have remained where they were—"and whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done, or is situate within the jurisdiction."

On the whole, although I do not mean to state it is an absolutely clear case, I think it does fall within the latter part of the rule. The injury complained of is such as described in the rule, and it is not so ridiculous that I can be entitled to disregard it. It is a case, at all events, as to which there is a question to be tried between the parties, and it seems to me that the case falls within that rule.

Then, there being a discretionary power to a certain extent, I treat the case up to this point as if it were a charge against a person totally unknown, who was never heard of in this Court before, and who does not occupy a position in life entitling him to any particular attention whatever; but it does happen that the Defendant who moves to discharge this writ is Chief Justice of *Sydney*, in *New South Wales*—a gentleman, I assume, therefore, and I must so consider him, as in a position of high character and high honour;

he is charged with conduct of an improper nature, and I assume that he is most grossly and improperly charged with that conduct; but it is a circumstance rather in favour of serving him with the writ, that it gives him, a gentleman of high judicial position, an opportunity of pledging his oath, and meeting the case by a denial, which I have no doubt he will be able to give to it; I cannot help thinking it will be more satisfactory to Sir *James Martin* that, having been served with this writ, he should now have an opportunity, after being brought before the Court in this way, of completely vindicating himself from the charges made against him; and he will do much better by answering the case in this Court than by driving the parties to sue him in a Court in the country where he happens to reside, and of which he is the head. Therefore, so far as I have any discretion, I think that I properly exercise that discretion by allowing the writ not to be discharged, and giving him an opportunity of meeting the case. I am bound to say that the affidavit made by Sir *James Martin*, which has been read this morning, does, in my opinion, if not wholly, to a very great extent, exonerate him from the charges that are made. I hope, and from the observations which have been made it seems probable, that the case is capable of further explanation; and, therefore, I think I am doing that which is greatly for the benefit of Sir *James Martin* by sustaining this writ, and affording him an opportunity of giving that denial, which I assume he will be able to give, to the case that is sought to be established against him. The motion to discharge the writ is therefore refused. With respect to the costs, if the Plaintiff brings such charges as these against a gentleman in the position of Sir *J. Martin*, and is unable to prove them, he will most richly deserve to pay the costs. If, on the other hand, he succeeds in the cause, he will get the costs; therefore I think that justice is done by making the costs of the motion on both sides costs in the cause.

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From this decision Sir *J. Martin* appealed. The case came before the Court of Appeal on the 11th of January, 1877.

C. A.

Higgins, Q.C., and *Sangster Green*, for the Appellant.

Freeling (*Glasse*, Q.C., with him), for the Plaintiffs.

Argument.

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The same line of argument was pursued, and the same cases cited, as at the hearing before the Vice-Chancellor; and in addition the following cases were referred to: *Diamond* v. *Sutton* (1); *Foley* v. *Maillardet* (2).

THE COURT allowed the statement of claim to be read, and also admitted the affidavit of Sir *J. Martin de bene esse.*

Judgment, C. A. James, L.J.

JAMES, L.J. :—

I am of opinion that, as matters now stand before us, the order of the Vice-Chancellor ought to be discharged.

The practice of the Court of Chancery, and the practice of the Courts of Common Law under the *Common Law Procedure Act*, were different with respect to obtaining leave to serve a party abroad. In the Courts of Common Law, beyond all question it was required that there should be an affidavit shewing that there was a cause of action, and that the cause of action arose within the jurisdiction. In the Court of Chancery that was not required, and one reason was, that the Court of Chancery, before any service at all was allowed, said that the whole of the case was stated on the bill, which the Court might look at; and it was then required that the bill should bear the signature of counsel, to which the Court was in the habit of paying—as it ought to pay and as it always will be warranted in paying hereafter, as it has done heretofore—the greatest possible respect. The signature of counsel to the bill was to that extent a voucher that the case was not a mere fiction. However, now there is no such thing as the Court of Chancery, and there is no such thing as a Court of Common Law —they are both combined in one—and all the cases are now put together in one mass, and are dealt with in the same manner for all purposes.

What, then, is it reasonable that the Court should now require? It appears to me that the Court, having a discretion (and it is admitted on both sides that the Court must have a discretion in the matter of the service of a writ abroad), before it brings to this country an English gentleman residing in a colony, and holding high office there, to litigate a matter, which of course must be a

(1) Law Rep. 1 Ex. 130. (2) 1 D. J. & S. 389.

subject of great difficulty and annoyance to him, ought to be satisfied that there is really a cause of action, and that that cause of action arose within the jurisdiction.

Now, in this case it appears to me that when the writ was issued there was no affidavit before the Court verifying the cause of action. If we are to look at the whole matter now before us, the statement of claim and the affidavit which has been put in in answer, which can only be admissible for a limited purpose, possibly the Vice-Chancellor was right in saying that there was a case to be tried. But I think, before the writ was issued in the first instance, there ought to have been an affidavit of merits to this extent, that is to say, an affidavit by the solicitor or some other person, saying, in the clearest possible way, "I have been advised and believe that the Defendant, against whom the writ is asked for, made a misrepresentation with regard to the matters in question, and that that misrepresentation has been used in *England*, and that in consequence of such misrepresentation so being used in *England*, the company have been put to a considerable expense, and he received the profits," or something to that effect. That would have been a cause of action, and a cause of action arising in *England*. There is some difficulty in saying what ought to be done, but something equivalent to that was required by the old *Common Law Procedure Act*, and, in my opinion, that ought to be now done before any man out of the jurisdiction is called upon to answer anything that anybody chooses to put into a writ of summons. I should be very much shocked if I were made a Defendant to a claim or action in some very remote country; and that is exactly what is sought to be done here. I think it can do no harm, and I think it will be throwing no difficulty in the way of justice in this country (and this country is the proper place for giving relief) if the Plaintiff is required to shew simply the short nature of the case which is intended to be made against the Defendant, and that the person having the conduct of the matter has every reason to believe that he can make it out. I think a Plaintiff ought to have no difficulty in producing such an affidavit; because it is not an affidavit which, as a general rule, ought to be controverted, for, if it were controverted, the Court would have to try the merits of the case upon an application for

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the purpose of setting aside the writ, a thing which it would be quite impossible to permit. It is a common thing for a man to apply to set aside an action or to defend an action upon a bill of exchange, and in many other cases, in which affidavits of that kind are required, and the Court sees whether there is a *primâ facie* case upon the affidavits, without allowing them to be controverted by the other side. I am therefore of opinion that in this case there ought to have been that affidavit in the first instance, but I think that as this is the first occasion on which a question has ever come before the Court as to which of the two practices, the old practice of the Court of Chancery, or the practice of the Courts of Common Law, is the one which ought, in the discretion of the Court, to prevail—I think that although I take a different view to the Vice-Chancellor in this case, before the order is finally set aside, we ought to allow the Plaintiff, if he can, to make an affidavit verifying the case to the extent to which I have suggested, of course, not as to anything further or otherwise than that. If he can make that affidavit, I think we ought not to put him to the expense of getting a new writ.

Baggallay, J.A. BAGGALLAY, J.A.:—

I regret that I am unable to adopt the same view of the question now under consideration as that which has been expressed by the Lord Justice. The substantial question we have to consider is the true construction to be put on the 1st and 3rd rules of Order XI. of the Rules of Court, 1875. Now, those rules are to supersede the Orders previously in force on this subject, namely, the Consolidated Orders of the Court of Chancery, and the 18th section of the *Common Law Procedure Act*, so far as regards actions in the Supreme Court. I have been very much perplexed in this case by the difference, as far as regards the mode of procedure with regard to service out of the jurisdiction, in the two classes of cases. The course of procedure in the Court of Chancery has been very well pointed out in the case of *Maclean* v. *Dawson* (1). That was a decision on the Consolidated Orders, and it was there pointed out that what the Court would do when an application was made for leave to serve a writ out of the juris-

(1) 4 De G. & J. 150.

diction would be to examine into the bill. Now, no affidavit whatever was necessary for the purpose of shewing that the allegations set out in the bill were true. What the Lord Justice *Knight Bruce* said was (1): "It is impossible not to observe that no affidavit or other evidence as to the truth of the Plaintiff's case is required," and then he went on to point out "that it is incumbent on the Court to look into the bill, although not supported by evidence, for it is easy to conceive the case of a bill so plainly absurd or relating to such a subject-matter or to a controversy between persons so circumstanced that the Court ought at once to decline to act. I do not think this is a case of that description. I was struck during the argument with the circumstance that the bill is probably demurrable, not on the merits of the case, but because it asserts a demand to the discussion of which the presence in some sense of a legal personal representative, constituted according to the law of *England*, may be requisite, and does not allege or deny (I believe) the existence of such a representative;" and he thought it was not a case in which an order for serving a writ out of the jurisdiction should be discharged. Then Lord Justice *Turner* put it, if possible, more strongly. He says (2): "I wish, however, to state distinctly that in my opinion the Court has a discretion in these cases, and that I consider it to be the duty of the Court to look into the bill for the purpose of satisfying itself how such discretion ought to be exercised. The discretion ought, in my judgment, to be as carefully exercised upon an application to discharge an order allowing service out of the jurisdiction as upon the original application for the order." Then down to the time of the present *Judicature Act*, by which these new rules were introduced, it was not the practice of the Court of Chancery to require an affidavit as to the truth of the facts which were stated on the face of the bill. When Order XI. of the *Judicature Act* came into operation, it was necessary to provide for the new and additional circumstance that there was no longer a bill before the writ was issued, and therefore it was necessary that something should be provided which would correspond (I am now stating my impression of the rule) with the statement of facts which the Court had under the old practice before it. Therefore, by the

(1) 4 De G. & J. 156. (2) 4 De G. & J. 157.

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3rd rule it was provided that "every application for an order for leave to serve such writ or notice on a Defendant out of the jurisdiction shall be supported by evidence, by affidavit or otherwise, shewing in what place or country such Defendant is or probably may be found, and whether such Defendant is a British subject or not"—both these things were required under the old practice—"and the grounds upon which the application is made."

Now, these words, taken by themselves, certainly convey to my mind that there was no intention to alter the old practice, under which an affidavit of the truth of the facts was not required. Then there is the difficulty to be borne in mind that under the *Common Law Procedure Act* there was a different course of procedure, and the present Rules are intended to apply to the proceedings in the Courts of Common Law as well as in the Court of Chancery. The *Common Law Procedure Act* says, "It shall be lawful for the Court or Judge, upon being satisfied by affidavit that there is a cause of action which arose within the jurisdiction or in respect of the breach of contract made," to direct that the Plaintiff shall be at liberty to proceed with the action. Now, it has been argued that the Court had to be satisfied by an affidavit that there was a cause of action. I am not by any means sure that that meant that it was necessary to shew that there was a cause of action, and not rather that the alleged cause of action was within the jurisdiction. But however that may be, I will assume, for the purpose of the observations I have made, that the rule was more stringent before the Rules were made. But it does seem rather singular, if it was intended to adopt in the service of writs in all the Courts the more stringent practice of the Common Law Courts, that you do not find those words which were found in the 18th section of the *Common Law Procedure Act* repeated in the 3rd rule of Order XI. If I am right in this view of the case, it appears to me first of all that there was a discretion in the Judge to consider whether he had before him a sufficient statement of the grounds upon which the application was made. I am bound to say that in the present case I should have been quite as well satisfied if the Vice-Chancellor had taken a different view, for I must confess that the statement of claim (if that can be looked at), or the indorsement on the writ, does not contain to my mind

a sufficiently clear ground upon which the action was to proceed. Be that as it may, it appears to me that it was a question for the Vice-Chancellor's consideration, in his discretion, whether the statement which was before him was sufficient. I am disposed to think that that is a discretion in the Vice-Chancellor which we ought not to interfere with unless there has been an omission of something which the Rules imposed upon him. If the construction of the 3rd rule be that the learned Judge in every case should require an affidavit, then there was an omission on the part of the Vice-Chancellor to require that evidence which the 3rd rule really made imperative upon him. But having already expressed my opinion that it was not imperative upon him to require an affidavit of that kind, I entirely agree with what was said by Lord Justice *Turner*, in the case of *Maclean* v. *Dawson* (1), that it is a question of discretion, with which, I think, we ought to abstain from interfering.

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BRAMWELL, J.A.:—

Bramwell, J.A.

I am of the same opinion as Lord Justice *James*. By the 3rd rule of Order XI. "every application for an order for leave to serve such writ or notice on a Defendant out of the jurisdiction shall be supported by evidence, by affidavit or otherwise, shewing in what place or country such Defendant is or probably may be found, and whether such Defendant is a British subject or not, and the grounds upon which the application is made." Now, was there before the Vice-Chancellor, when the first order was made, any evidence shewing the grounds on which the application was made? It seems to me there was not. What are the grounds on which such an application is made? The grounds are that there is a case within rule 1 of Order XI., that is to say, a cause of action such as there described arising in *England*.

Now where is the evidence which shews there was a cause of action arising in *England?* The only document that the Vice-Chancellor had before him was the affidavit of Mr. *Appleyard*, who says that the Plaintiff claims against the Defendant, amongst other things, the delivery up of the debentures and shares obtained by the Defendant, and they claim delivery up to be cancelled of the contract between the Plaintiffs and the Defendants, and so on.

(1) 4 De G. & J. 157.

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He states what they claim, but he does not even say that they claim it in respect of anything done by the Defendant, or caused by him to be done in *England*. How is it, then, possible to say that the application has been supported by evidence shewing the grounds upon which the application is made, namely, a case within the 1st rule of Order XI.? It seems to me impossible to say so. I see no difficulty at all in that being done where it can be honestly done, and it is a very reasonable thing that it should be done, for it is certainly an inordinate thing that without good cause a man should be dragged from the antipodes to answer a claim for which there can be no kind of pretence. I quite admit the force of the argument that has been raised on the words of the *Common Law Procedure Act*, to which we may in effect liken the present procedure. There it was enacted that "the Judges shall be satisfied as to the cause of action." I think there is great force in what was observed by Sir *Richard Baggallay*, that probably that meant that he should be satisfied that the alleged cause of action arose in *England*, but it seems to me that the *Common Law Procedure Act* rendered necessary an affidavit that there was a cause of action, and that it arose in *England*, and, in my opinion, the same thing was intended by the present rule, although the same words are not used, and I think so for these reasons: In the first place, as I have observed already, the grounds upon which the application is made are to be shewn by affidavit or otherwise. I think that is enough. But, independently of that, it seems to me that if one of the two practices were to be abrogated, in all reason the Common Law practice should be preserved—for by the Common Law practice it was necessary to get an order for leave to serve the writ out of the jurisdiction before it was issued. By the Equity practice that was not so, as the Lord Justice has observed. The bill was filed first, and that gave the Court some means of judging what the nature of the case was; but now it is equally necessary under the new Rules as well in cases that are brought to the Chancery Division as in those in the Common Law Divisions, that leave should be got before the writ is issued. This consequence follows, either that no affidavit is necessary in the Chancery Division, and none is necessary in the Queen's Bench, Common Pleas, and Exchequer Divisions, or that an affidavit is necessary in each of them. Now look

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at the ordinary cases that take place in the Common Law Divisions, for instance, actions for money lent, goods sold and delivered, and similar things. What would be the use of a mere statement? The Plaintiff might say, "I claim of the Defendant £50 for money lent." How does that shew the ground upon which he makes his application?

It seems to me, therefore, that, not only upon the construction of Order XI., rules 1 and 3, but also upon the reason of the thing, there ought to be an affidavit shewing the grounds on which the application is made, namely, shewing that there is a case within rule 1 which arose in *England* within the jurisdiction of this Court. As I have said, I think there is no difficulty in making that. I should not think it necessary (I do not pronounce a final opinion upon it)—but I should not think it necessary that an affidavit should be made with the same rigour that used to be required in an affidavit to hold to bail. Very probably not. It very probably would be sufficient if a secretary of a company such as this were to swear that there was a good cause of action, stating what it was, not merely stating it generally, but stating something definitely. It was not necessary, even in an affidavit to hold to bail, that it should be made by a creditor. It was only an affidavit verifying the facts. Therefore it is unnecessary that the Plaintiffs should make the affidavit themselves. Anybody who can swear to it can make the affidavit. I really think, therefore, that as this is a power which, considering it is to be applied to a foreigner under the same circumstances as it is to be applied to a British subject, with this exception only, that you give a person notice of the writ which you serve on a British subject—bearing in mind that unless we were careful we might be assuming a jurisdiction which would be treated by a foreign government as a nullity—bearing those things in mind, and bearing in mind the excessive hardship of bringing a man from where he is, and where there are judicial tribunals in which he might be sued—because, although this Defendant happens to be Chief Justice of the colony, he might have been any other person residing in *Sydney*, and not a member of the Court—I think the Court ought to require satisfactory evidence before it issues the writ. There is no evidence here, merely a statement of claim without any verification of that

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claim, and I consequently think that there were not sufficient materials before the Vice-Chancellor for the order which he made.

I think this is an entirely new case. As far as I am aware there is no case upon it, and I suppose if the order were to be discharged the writ would be gone, because it would be issued without authority. In that case it would be competent for the Plaintiffs to make a fresh affidavit and issue a fresh writ. Therefore, to save expense, I think the Plaintiff should be allowed to file a fresh affidavit.

The case, therefore, stood over for the Plaintiff to file a fresh affidavit.

Feb. 2. The case came on again, when a fresh affidavit was produced by the Plaintiffs. It was made by Mr. *Appleyard*, the secretary of the company, and was filed on the 25th of January, 1877. Mr. *Appleyard* stated that he was informed and believed that the Defendant, Sir *J. Martin*, in collusion with the other Defendants, and for the purpose of procuring a company to be formed in *England*, and in consideration of money and shares to be obtained by him from the company when formed, made in *England* certain false and fraudulent misrepresentations as to the value and nature of a certain mine, whereby the Plaintiff company was induced to issue certain debentures and shares to the Defendants, or some of them, in *England*, and to incur certain expenses and pay certain moneys in *England*. He further swore that the Plaintiffs were advised, and he believed, that the Plaintiffs had a good cause of action against the Defendant, Sir *J. Martin*, for damages in respect of the false representation so made by him within the jurisdiction of the Court.

Argument.

Glasse, Q.C., and *Freeling*, appeared for the Plaintiffs.

Higgins, Q.C., and *Sangster Green*, for Sir *J. Martin*, submitted that the affidavit was not sufficient to displace the statements in the Defendant's affidavit, from which it appeared that the prospectus, which was signed by him and sent over to this country, contained no statements by him, but only by the promoters; and, further, that the prospectus was altered in this country, and the

company was formed in a different manner from that of which he had agreed to be trustee. He was not, therefore, responsible for the misrepresentations (if any) made in *England* on which the company was founded.

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THE COURT (*James*, L.J., *Brett*, J.A., and *Amphlett*, J.A.) were of opinion that the affidavit sworn by the secretary of the Plaintiff company was sufficient, and refused to disturb the order of the Vice-Chancellor. The appeal was therefore dismissed; the costs of the appeal to be costs in the cause.

Solicitor for Plaintiffs: *W. F. Stokes.*
Solicitors for Defendant: *Peachey & Lloyd.*

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[1875 T. 29.]

Power of Leasing—Mining Lease—Lease by Trustees of Two Estates held on Distinct Trusts—Settled Estates Act, 1856 (19 & 20 *Vict. c.* 120), *s.* 10—*Specific Performance.*

Two contiguous estates were devised to trustees upon trust for distinct *cestuis que trust*. By an order made under the *Settled Estates Act*, power was given to the trustees to grant mining leases in conformity with and subject to the provisions of the *Settled Estates Act*; such leases to be granted with the consent of the respective tenants for life if of age. The trustees and the two tenants for life entered into an agreement with the Defendants to grant them a mining lease of the two estates for forty years (or fifty years if the Court should consent; both estates were intended to be comprised in the same lease, and the rents and royalties were to be reserved as if they were one estate, and there was to be one shaft for working the minerals under both estates; and it was also agreed that the lessors should be at liberty to apply to the Court under the *Settled Estates Act* for further powers of leasing:—

Held (affirming the decision of *Hall*, V.C.), that the trustees had no power to grant such a lease of the two estates, and specific performance of the agreement was refused.

Whether in any case a lease by trustees by one demise of two estates held upon distinct trusts would not be a breach of trust—*Quære.*

Statement.

THE bill in this case was filed by the trustees, and two persons beneficially interested, under the will of *Joseph Whiteley*, for the specific performance of an agreement for a mining lease.

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J. Whiteley, by his will, dated the 9th of May, 1856, devised to his trustees, among other things, his estate called *Swine Lane House*, upon trust for his daughter *Anne Whiteley* for life, with remainder to her husband for his life, with remainder to her children as therein provided, with cross remainders to his other daughter and her children. And the testator devised to the same trustees his estate called *Monkroyd* to his daughter *Sarah Thomas* for life, with remainder to her husband for life, with remainder to her children as therein provided, with cross remainders to his other daughter and her children.

The two estates were contiguous, and contained valuable seams of coal, but the only shaft by which the coal could be worked was on the *Monkroyd* estate.

There being no power to grant mining leases in the will, application was made to the Court under the Settled Estates Acts, and an order was made by Vice-Chancellor *Malins* on the 31st of July, 1869, by which it was ordered that powers of granting mining leases in conformity with the Settled Estates Acts, and subject to the provisions and restrictions therein contained, should vest in the trustees, as the trustees of the will of the said testator, and in the survivors and survivor of them, and in the trustees or trustee for the time being of the said will, such powers to be exercised with the consent of the respective tenants for life (if any) for the time being in possession of the estates to which the respective mines might belong who might have attained the age of twenty-one years, or if there should be no such tenants for life, then without such consent. And it was ordered that all money to be set aside out of the rents to be reserved on any such leases should be paid to the trustees or trustee for the time being of the said will, and that, until the money could be applied to one or more of the purposes mentioned in the Acts, the same should be from time to time paid into the bank, with the privity of the Accountant-General, to the credit of "the estate of *Joseph Whiteley* deceased, the mining account."

On the 31st of July, 1874, an agreement in writing was made between the trustees of the first part, *Ann Whiteley* and *Sarah Thomas*, the tenants for life, of the second part, and the Defendants of the third part, whereby it was agreed that the trustees should

demise beds of coal lying under the two estates of *Swine Lane House* and *Monkroyd* for fifty years from the 1st of April, 1874, provided the sanction of the Court of Chancery could be obtained under the Settled Estates Acts, and if not, then the term to be for forty years, the term and also the conditions of agreement for the leases to be approved by the Court if necessary. The lessees were to be at liberty to sink pits on any part of the estate. The rent to be £180 per acre, subject to allowances for gaults, throws, and unsaleable coal. The minimum rents to be as follows: £200 per annum for the first and second years of the term; £800 per annum for the third and fourth years of the term; £1000 per annum for the fifth and sixth years of the term; and £1200 per annum thenceforth until the whole of the coal should be paid for, whether got or ungot. A contingent additional rent was to be reserved for all coal which should in any half year be got in excess of what should have been paid for at the end of the half year in minimum rents at the rate of £180 per acre. The contract contained, among other clauses, a stipulation that the lessees should pay a way-leave for coal drawn out of the pits sunk on the estate from property not comprised in the lease; and a proviso that the lease should contain all other clauses and stipulations usual in mining leases, and that the lessors should be at liberty to apply to the Court for increased powers of leasing under the *Settled Estates Act*.

After considerable delay, arising from the difficulty of apportioning the rents between the tenants for life, and a question which had arisen whether there should be one or two leases, the Defendants, on the 11th of November, 1874, wrote to the trustees refusing to complete the contract, and the trustees and the two tenants for life filed the present bill to enforce specific performance against them.

The only important question in the suit was, whether the trustees had power to grant the lease under the order of the 31st of July, 1869. The case came on before Vice-Chancellor *Hall* on the 19th of June, 1876.

Morgan, Q.C., and *T. A. Roberts*, for the Plaintiffs.

Dickinson, Q.C., *Ince*, Q.C., and *Bardswell*, for the Defendants.

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HALL, V.C.—

It appears to me that this is not a case in which the Plaintiffs are entitled to specific performance of the agreement upon which they rely. The foundation of the whole of the Plaintiffs' title is the order made by Vice-Chancellor *Malins* authorizing the granting of leases. The property in question is a property subject to the trusts of a will devising the estates. The property consists of two distinct portions—the one portion settled upon one lady for her life and afterwards to her children, with remainder over, and the other portion settled upon another lady for her life, with remainder to her children, with remainder over. The effect of the order is to create powers of leasing in the trustees to be exercised with the consents of tenants for life respectively; and those powers are to have the same operation as they would have had if the will itself had contained powers of leasing given to the trustees with those consents. Supposing the will to have contained such powers, it would have been a plain breach of trust on the part of the trustees to attempt to grant a lease of the two properties at one entire rent, with clauses treating the property as one entire property. In this particular case the trustees had the legal estate, and therefore the leases to be granted would be effectual at law whether the Vice-Chancellor's order existed or not. But, for the purpose of testing the validity of the leases, the case must be treated exactly in the same way as if they had only legal powers of granting leases. Supposing that to have been the case, such legal powers, it is plain, could not have been exercised so as to grant the two properties at one entire rent, with provisions applicable, and only properly applicable, to one entire property owned by one and the same set of parties, either in possession or in remainder. This lease in a remarkable manner illustrates the inconvenience of such a course, because there are provisions in this agreement which apparently contemplate that there shall be one shaft by means of which the minerals are to be gotten from both of the properties. There is a provision in the lease for the way-leave rent being paid in respect of minerals gotten from adjoining properties, and how those provisions are to be adjusted and settled as between these two properties and the persons interested in the income from them, I am at a loss to know. Again,

there is one ground-rent fixed for the whole property. It is to be by the statute acre. Whether that sum for the statute acre is arrived at by considering each and every portion of the coal and mineral under the property as of exactly the same value and equally capable of being gotten at exactly the same expense, I have no idea, and there is nothing whatever to shew. It may well be that the mineral under one portion of the estate is worth more than that under another, from its local position, either by reason of its requiring less labour to get it, or by reason of its being more easily carried away; but in this lease it is all lumped together as one property, and it may be that great injustice would be done to one of the tenants for life, or to those claiming in remainder under her, by the property being thrown into the lease with the other. It appears, therefore, to me to be plain that this agreement is not an agreement which is sanctioned by the order of the Vice-Chancellor.

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Irrespective of that, it is proposed that there should be an application made to the Court to see if the Court would grant a fifty years' lease instead of one for forty. It is not an agreement which this Court would sanction for a moment; and I do not hesitate to say that if such a petition had come before me it would certainly have been dismissed; and upon the ground which I have been referring to rather than upon the ground of any difficulty in apportioning the rent, or any similar ground. Under these circumstances, it appears to me that there can be no specific performance of the agreement. The bill must be dismissed, and of course it must be dismissed with costs.

From this decision the Plaintiffs appealed. The appeal was heard on the 15th of February, 1877.

C. A.

Morgan, Q.C., and *T. A. Roberts*, for the Appellants:—

Argument.

The provisions of the *Settled Estates Act*, 1856, are quite large enough to support the proposed lease; and by the 4th section of the *Settled Estates Amendment Act*, 1858, the Court has power to extend the term to fifty years. The effect of the order of the 31st of July, 1869, is to import the power of granting leases into the will. If the power had been in the will, it would not have been a

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breach of trust for the trustees to join the two estates in one lease if it was manifestly beneficial to the *cestuis que trust*. Trustees with a power of sale may join with another owner in selling the two estates in one lot, and may apportion the purchase-money: *Cavendish* v. *Cavendish* (1); *Morris* v. *Debenham* (2); *Graham* v. *Oliver* (3). In *Rede* v. *Oakes* (4) there were special circumstances which induced the Court to refuse specific performance. There is no reason why in the same way estates held on different trusts should not be joined in the same lease. The only difficulty would be in apportioning the rents, and with that the lessees have nothing to do. It is entirely between the trustees and the *cestuis que trust*, and can be decided by the Court. In this case the trustees have the legal estate of both estates, and there can be no legal difficulty in reserving one rent for the whole property. The only question is, whether the lease is beneficial to the *cestuis que trust*, and it is clear that this is the case. For the estates are so situated that it will be almost impossible to let the minerals under the two estates except to the same persons; and if so, it is manifestly most convenient to include both estates in one lease. But if the lessees insist upon having two leases, we are willing to grant them.

Dickinson, Q.C., *Ince*, Q.C., and *Bardswell*, for the Respondents, were not called on.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I am of opinion that the order of the Vice-Chancellor in this case cannot be disturbed. *Primâ facie*, beyond all question, such a lease as this of two properties would be a breach of trust on the part of the trustee. If a lease under two trust estates, and these are two separate estates, could be granted, one does not see why a lease under three, four, or five could not be granted in the same way. There are two distinct properties belonging to two distinct sets of persons, let at one rent, with powers over the one property for the benefit of the other, and various arrangements which it appears to me it is utterly impossible to suppose in an ordinary case could have been fairly introduced into a lease.

(1) Law Rep. 10 Ch. 319.
(2) 2 Ch. D. 540.
(3) 3 Beav. 124.
(4) 4 D. J. & S. 505.

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But then it is said by the Plaintiffs that they can shew by evidence that there are special circumstances in this particular case; the properties are so peculiarly situated that what would in an ordinary case be a breach of trust cannot be a breach of trust in this case, but both estates must be benefited by it, in whatever mode the lease is apportioned between them. The Defendants may well say in answer to that, "We will not have a lease upon which we may have to litigate these questions thirty or forty years hence, when the *cestuis que trust* may object that it was a bad lease, and we shall have to prove that it was exactly according to the rules of the Court by shewing how very beneficial it was." In many respects it appears plainly on the face of this lease that it cannot be beneficial—it may be beneficial for the owners of one of the two estates, but it is very difficult to see how it can be beneficial to the owners of both.

Judgment, C. A. James, L.J.

I am of opinion, therefore, that the Vice-Chancellor's objections to this lease were clearly right, and the appeal must be dismissed with costs.

BAGGALLAY, J.A.:—

Baggallay, J.A.

I am of the same opinion. The question whether two or more sets of trustees for different properties, with different *cestuis que trust*, having separate powers of sale, can exercise the powers of sale by selling the property in one lot, must depend upon the particular circumstances of the case for the time being under consideration. The cases of *Cavendish* v. *Cavendish* (1) and *Morris* v. *Debenham* (2) are cases in which Courts have upheld contracts of that kind. On the other hand, *Rede* v. *Oakes* (3) is a case in which the Court declined to enforce specific performance upon an intending purchaser. But the question whether trustees similarly situated, and having leasing powers, can make one lease of several properties, is a very different one. No case has been cited in which any contract for such a lease has been upheld, and although I am not prepared to say that in no case could such a contract be upheld, I am satisfied that the circumstances to uphold a contract of that kind must be very special.

(1) Law Rep. 10 Ch. 319. (2) 2 Ch. D. 540.
(3) 4 D. J. & S. 505. 10 Jur NS 1246.

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Judgment, C. A Baggallay, J.A.

But this is not the question which we have now to consider. The question is, whether specific performance should be decreed of the contract which was entered into in July, 1874. Now, it is admitted, and it is quite clear, that the trustees had no power under the will to grant such a lease. It is to my mind equally clear that they had no power to grant such a lease under the order of Vice-Chancellor *Malins*, which was made on the 31st of July, 1869, because all that that order authorized them to do was to grant leases in conformity with the *Settled Estates Act*—that did not authorize them to grant any such leases as they might think fit. But it is suggested in the present case that, under the concluding provision of the contract itself, namely, that "the lease shall contain all other powers, provisions, and stipulations usual in mining leases," the contract authorizes an application to the Court for further and increased powers, if necessary, under the *Settled Estates Act*. Now, I am satisfied that the Court would have had no power whatever to authorize the granting of a lease such as that which has been contracted for between the Plaintiffs and Defendants in this case. If it was possible under any circumstances to authorize the granting of one lease of these two properties, it could only be upon the insertion of very special provisions, many of them more or less burdensome on the intending lessee; and the only thing that could be done under this contract would be to apply for powers to grant such a lease as has been contracted for here, that is, a lease of two properties under one lease, and reading it throughout as one lease, without any special provisions for the *cestuis que trust*. I am satisfied, therefore, that if any application was made for such a purpose as that it must be refused, and that therefore the bill was rightly dismissed by the Vice-Chancellor.

Bramwell, J.A. BRAMWELL, J.A.:—

I am of the same opinion. I do not pretend to know much of the powers or duties of trustees in such matters as this, but I am told, and well believe, that an obviously improvident lease is a breach of trust. Now, just see what would be the consequence of such a lease as this. One of the estates might go without any rent for half the term; also at the end of the lease some of the coal might be left under one part of the property and the shaft

left upon the other part of the property. If to guard against these consequences special covenants were introduced, they would make the lease in effect two leases, and the lessees would be entitled to say, "This is in effect two leases, which we never undertook to accept." It seems to me, therefore, that the judgment of the Vice-Chancellor is obviously right.

Solicitor for Appellants: *G. Badham*, agent for *Marsden, Williams, & Co., Wakefield.*

Solicitors for Respondents: *Layton & Jaques*, agents for *Scholefield & Taylor, Batley.*

Ex parte ATTWATER. *In re* TURNER.

Unregistered Bill of Sale—Possession taken by Grantee before Filing of Liquidation Petition by Grantor—Prior secret Act of Bankruptcy—Relation back of Trustee's Title—Protected Transaction—Leave to appeal to House of Lords—Bills of Sale Act, 1854 (17 & 18 *Vict. c.* 36), *s.* 1—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 11, 71, 94, 95, 125.

In the 1st section of the *Bills of Sale Act*, 1854, the "time of such bankruptcy" means the time of the act of bankruptcy.

The grantee, under an unregistered bill of sale, took possession of the property comprised in it before the filing of a liquidation petition by the grantor. The day before possession was taken the grantor had committed an act of bankruptcy of which the grantee had no notice:—

Held, that the title of the grantee was defeated by virtue of the relation back of the title of the trustee in the liquidation to the earlier act of bankruptcy.

The protecting clauses of the *Bankruptcy Act*, 1869, ss. 94 and 95, have no operation as regards a transaction which is made void by the *Bills of Sale Act.*

Leave to appeal to the House of Lords refused.

The principles upon which the Court acts in granting or refusing leave to appeal to the House of Lords explained.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, sitting as Chief Judge in Bankruptcy.

On the 24th of September, 1875, *Henry Turner*, a publisher, executed a bill of sale of his stock-in-trade to *Charles Attwater*, to secure the repayment of £1000 with interest. On the 20th of

C. A. 1876 *Ex parte* ATTWATER. *In re* TURNER.

Statement.

May, 1876, *Turner* executed a deed of further charge in favour of *Attwater* on the same property to secure the repayment of £500 and interest. Neither of the deeds was registered under the *Bills of Sale Act*. *Turner* having made default in payment of the interest, *Attwater*, on the 24th of August, 1876, took possession of the property comprised in the two deeds. On the 29th of August *Turner* filed a liquidation petition, under which, on the 21st of September, *W. C. Cooper* was appointed trustee. He claimed to be entitled to the property comprised in the bill of sale. Evidence was adduced which shewed that, on the day before the possession was taken by *Attwater*, *Turner* had committed an act of bankruptcy by denying himself to several of his creditors. He had given orders to his clerks to deny him to any creditors who inquired for him, and he was, in fact, denied to several creditors who called to see him. *Attwater* had no notice of this. The Registrar held that the trustee's title related back to this act of bankruptcy, and defeated the title of the mortgagee. The mortgagee appealed.

Argument.

Roxburgh, Q.C., *Doria*, and *F. O. Crump*, for the Appellant:—

The *Bills of Sale Act* (17 & 18 Vict. c. 36), s. 1, makes an unregistered bill of sale void as against the assignees in bankruptcy or insolvency of the grantor "so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale, which at or after the time of such bankruptcy, or of filing the insolvent's petition in such insolvency (as the case may be), and after the expiration of such period of twenty-one days, shall be in the possession or apparent possession of the person making such bill of sale." We contend that when the Act was passed "the time of such bankruptcy" meant the time of the fiat or adjudication, and not the time of the commission of any act of bankruptcy to which the title of the assignee in bankruptcy might relate back. But if it is said that the title of the trustee in the liquidation relates back to the prior act of bankruptcy, by virtue of sect. 11 of the *Bankruptcy Act*, 1869, the answer to that is that a purchaser for value who completes his title by taking possession before the appointment of the trustee, without notice of

any prior act of bankruptcy, is protected by sect. 94 or sect. 95 (1) of the Act: *Ex parte Arnold* (2); *Graham* v. *Furber* (3). If the *Bankruptcy Act* is referred to to shew that the trustee's title relates back, the protecting sections must also be imported. If the Registrar's decision is right, a purchaser of goods from a trader, who leaves them a day in the vendor's possession, may lose them if the trader has committed a secret act of bankruptcy before the goods are delivered. If this is the state of the law, no one can safely lend money on the security of a bill of sale.

Winslow, Q.C., and *H. Winch*, for the trustee:—

The mortgagee acquires his title under the *Bills of Sale Act*, which contains no protecting clause; sects. 94 and 95 have reference only to the provisions of the *Bankruptcy Act*. If the grantee of a bill of sale neglects to register his security, he runs the risk of being defeated by a secret act of bankruptcy committed by the grantor. *Ex parte Arnold* was the case of a registered bill of sale, and it was held that the taking of the goods out of the grantor's order and disposition after the commission of an act of bankruptcy of which the grantee had no notice was a dealing with the bankrupt which was protected by sect. 94; a similar observation applies to *Graham* v. *Furber*. That has no application to an unregistered bill of sale. It has always been held that the "time of a bankruptcy" means the time of the commission of any act of bankruptcy

(1) Sect. 94 provides: "Nothing in this Act contained shall render invalid (*inter alia*) any contract or dealing with any bankrupt, made in good faith and for valuable consideration, before the date of the order of adjudication, by a person not having, at the time of making such contract or dealing, notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication."

Sect. 95 provides: "Subject and without prejudice, to" (the provisions of sects. 87, 91, and 92 of the Act), "the following transactions by and in relation to the property of a bankrupt shall be valid, notwithstanding any prior act of bankruptcy,—1. Any disposition or contract with respect to the disposition of property, by conveyance, transfer, charge, delivery of goods, payment of money, or otherwise howsoever, made by any bankrupt in good faith and for valuable consideration, before the date of the order of adjudication, with any person not having at the time of the making of such disposition of property notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication."

(2) 3 Ch. D. 70.

(3) 14 C. B. 134.

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to which the title of the assignee in bankruptcy can relate back not merely the time when the act was committed upon which the adjudication was made: *Fawcett* v. *Fearne* (1). *Ex parte Jay* (2) is an authority in our favour, though the point does not appear to have been argued there; and so is *Ancona* v. *Rogers* (3). In giving the judgment of the Court in that case, Lord Justice *Mellish* said (4): "We think it was intended that if a man chooses to lend money upon a bill of sale, and does not register it, he should run the risk arising from his not being able to obtain possession of the goods before the grantor of the bill of sale commits an act of bankruptcy." Moreover the *onus* is on the Appellant to shew affirmatively that he had no notice of the prior act of bankruptcy: *Ex parte Schulte* (5). This he has not done.

Crump, in reply.

Judgment, James, L.J. —

JAMES, L.J.:—

I am of opinion that it is impossible to escape from the plain meaning of the words of the *Bills of Sale Act*. We have nothing to do with the policy or impolicy of that Act, whether it will interfere with any transactions or not, or whether the transactions with which it interferes may be desirable or undesirable in a commercial point of view. The Legislature have said, in so many words, that, if a man will take a bill of sale and will not register it, he shall be liable to the consequences mentioned in the Act, one of which is that the bill of sale is void as against the assignees in bankruptcy of the grantor, unless possession is actually taken before the bankruptcy. Now the question is, what does the word "bankruptcy" mean there? What did the word "bankruptcy" mean in the year 1854? It clearly meant the commission of an "act of bankruptcy" which was followed by an adjudication; it had received a judicial interpretation to that effect. It was held under the former Bankruptcy Acts that a man became bankrupt when he committed an "act of bankruptcy," and we cannot put any other legal meaning upon those words. The 94th section of

(1) 6 Q. B. 20.
(2) Law Rep. 9 Ch. 697.
(3) 1 Ex. D. 285.
(4) Ibid. 292.
(5) Law Rep. 9 Ch. 409.

the Act of 1869 has really nothing to do with the question. It is said that the 95th section protects the transaction. But that is a general enactment, and to hold that it affects the provisions of the *Bills of Sale Act* would be to hold that general words in a subsequent Act repeal a special provision in a prior special Act passed for a special purpose. This cannot be. I am of opinion, therefore, that the title of the grantee under the bill of sale is not good as against the trustee. The appeal will be dismissed with costs.

Judgment, James, L.J.

BAGGALLAY, J.A., concurred.

Baggallay, J.A.

BRAMWELL, J.A. :—

Bramwell, J.A.

I am entirely of the same opinion. I think it was in a case arising out of the *Bills of Sale Act* that I recently said in this Court that it appeared a hard case; and if it was a hard case, it was improbable, as my strong belief is that the law does not create hard cases. The present case is really not so, if we look at the provisions of the *Bills of Sale Act* and the intention of those who framed it. It was intended to insure the registration of bills of sale, and it gives the parties time to register them. If they choose not to do so, then the Legislature do not say that the bill of sale shall be absolutely void under all circumstances, but they say it shall be void as against the assignees in bankruptcy of the grantor (and under certain other circumstances), but especially as against the assignees in bankruptcy, if at the time of the bankruptcy the goods are in the possession of the grantor. Now a person who takes a bill of sale and advances money upon it may, if he chooses, run that risk. If he does not choose to do so he need not, for he may register the bill of sale. Any hardship, or apparent hardship, upon him, therefore, is of his own creating. Now, that being so, the first question we have to consider is, whether the word "bankruptcy" in the Act means "adjudication of bankruptcy," or, having regard to the form of procedure which was in existence at the time the Act passed, the "issuing of the fiat." Either of those expressions might have been used, if the Legislature had so thought fit, but instead of that they have used words which have been interpreted to mean,

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Judgment, Bramwell, J.A.

and which certainly I have always understood to mean, the commission of an act of bankruptcy.

The only remaining question is, whether the *Bills of Sale Act* has been repealed or modified by the 94th section, or more especially by the 95th section, of the present *Bankruptcy Act*. I am of opinion that it has not. Not that but there are words in sect. 95 which are apparently inconsistent with the *Bills of Sale Act*. But there is a well-known rule which says that, though a subsequent law abrogates a prior inconsistent law, that is not so where the prior law is not one of general application. Now, the object of this first law, the *Bills of Sale Act*, was to insure the registration of bills of sale, and the object of the 95th section of the *Bankruptcy Act* was not to make it less expedient or desirable that the grantee of a bill of sale should register it, or in any way to diminish the stringency of the provisions of the *Bills of Sale Act* as to the registration of bills of sale. The object of the 95th section is entirely different. Therefore it is not one of those cases in which a subsequent law abrogates a prior inconsistent law. It might be illustrated in this way: Supposing that the *Bills of Sale Act* had been limited to household furniture or stock-in-trade, it would be manifest that the general provisions of sect. 95 would not repeal the provisions of the *Bills of Sale Act*. It is hardly necessary to cite an authority upon this, but a somewhat similar case may be found in *Attorney-General* v. *Lockwood* (1). That is somewhat upon the same line of argument, though not precisely in point.

I am of opinion that the title of the trustee must prevail.

Statement.

1877. Feb. 8. *Crump*, for the mortgagee, applied *ex parte* for leave to appeal to the House of Lords.

THE COURT said that evidence must be given of the value of the debtor's estate, and desired that notice of the application should be served on the trustee.

Feb. 15. The application was renewed upon notice. There was evidence that the debtor's stock-in-trade had been valued at £6366,

(1) 9 M. & W. 378.

but that it had, since the commencement of the liquidation, become very much deteriorated. The book debts were estimated to be worth £1000. The debts due by the debtor amounted to £6425.

Crump, for the mortgagee:—

The question of law involved is one of difficulty and importance. The value of the estate is immaterial on the question whether leave should be given. Under the recent Orders of the House of Lords, the Appellant must give security to the amount of £200 for the costs of the appeal.

Winslow, for the trustee:—

The application is made too late. Time is always considered of importance in the administration of bankruptcy, and the Court, having a discretion, will have regard to the limit of twenty-one days which is fixed for the bringing of appeals to this Court: *Ex parte Brown* (1). The application must be made within a reasonable time: *Ex parte Marcus* (2). Moreover, the question is not one of sufficient difficulty or importance to justify an appeal to the House of Lords.

Crump, in reply:—

The Court did not sit in bankruptcy from the 21st of December until the 18th of January, and after that not till the 8th of February. The practice has always been to make these applications *ex parte*.

JAMES, L.J.:—

I should be sorry to decide this case merely upon the question of time. I am always glad that any decision of mine, or of a Court of which I am a member, should be subject to further review. But we cannot escape from the duty which is cast upon us by the Act, of determining whether we shall or shall not allow an appeal to the House of Lords. We have to say, not only whether the question involved is one of law or equity, but whether it is one of

(1) Law Rep. 9 Ch. 304. (2) 26 L. J. (Bkcy.) 15.

C. A. 1877 *Ex parte* ATTWATER. *In re* TURNER. Judgment, James, L.J.

sufficient difficulty or importance to merit a review by the final Court of Appeal. I cannot come to the conclusion that there is any real or substantial difficulty about the point of law involved in the present case. I think it is quite clear that the *Bills of Sale Act* cannot be overruled or repealed merely by an apparent inconsistency between it and the *Bankruptcy Act*. I could not honestly certify to the House of Lords that there is any legal difficulty in the case. No doubt the question may be one of some importance to the holders of unregistered bills of sale; the value of a number of bills of sale may be affected by our decision. But I do not think that is a matter which ought to be taken into consideration. The question is really only this—whether an unregistered bill of sale ought to be a more effectual security than it will be if our decision is right, and I do not think that this is a question of sufficient difficulty or importance to justify us in stopping the distribution of this debtor's estate pending an appeal to the House of Lords.

Baggallay, J.A. BAGGALLAY, J.A.:—

I am of the same opinion. [His Lordship referred to 12 & 13 Vict. c. 106, s. 18, and 14 & 15 Vict. c. 83, s. 10, and said:—] Sect. 71 of the *Bankruptcy Act*, 1869, does not enter into the same details, but only says that any order made by the Chief Judge in Bankruptcy shall be subject to an appeal, "with the leave of the Court of Appeal, to the House of Lords." In the absence of any express provision, then, I apprehend that the general rules and principles which should guide us with regard to appeals to the House of Lords must be considered to be the same as they were before the Act of 1869. Those principles are clearly stated by Lord *Cairns* in *In re Calthrop* (1), and I think that they are applicable to the present case. If there is any point of law at all in the case, which I very much doubt, I think it is, as Lord *Cairns* said in *In re Calthrop*, a mere scintilla. I do not entertain any doubt as to the correctness of our decision.

Bramwell, J.A. BRAMWELL, J.A.:—

I am of the same opinion. If our judgment were *motivé*, if

(1) Law Rep. 3 Ch. 252, 257.

it contained a recital that there was a difficult question of law, I could not assent to it.

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The application was refused with costs.

Solicitor for Appellant: *A. E. Copp.*
Solicitor for Respondent: *C. F. Knox.*

Ex parte WATSON. *In re* LOVE.

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Vendor and Purchaser—Stoppage in Transitu—End of Transit—Constructive Delivery—Agreement for particular Destination of Goods—Bill of Sale—"Other Assurances of Personal Chattels"—Bills of Sale Act, 1854 (17 & 18 *Vict. c.* 36), *s.* 7.

An agreement was entered into between *L.*, a merchant in *London*, and *W.*, a manufacturer in *Yorkshire*, that *W.* should from time to time supply *L.* with goods, *W.* drawing upon *L.*, and *L.* accepting, bills of exchange for the invoice price of the goods. *L.* was to ship the goods to *R.* at *Shanghai*, for sale on *L.*'s account. On receipt of the bills of lading *L.* was to send them to *R.*, to whose order they were to be made out. *W.* was to have a lien upon the bills of lading, and each shipment of goods in transit outwards, or in the hands of the consignee or any other persons, which lien, however, was to extend only to the particular shipment, and was to cease when the bills of exchange given for that shipment had been paid. No notice of this agreement was given to *R.* In pursuance of the agreement *L.* ordered a parcel of goods of *W.* The goods were packed by *W.*'s packer, who forwarded them by railway to *London* in bales marked for *Shanghai*, and addressed to a ship called the *Gordon Castle* designated by *L.*, which was loading in the *West India Docks* for *Shanghai*. The freight to *London* was paid by *W.* The packer in advising *L.* of the despatch of the goods, told him that they were "at his disposal." *L.* accepted a six months' bill of exchange drawn upon him by *W.* for the invoice price. The railway company, in advising *L.* of the arrival of the goods at their *Poplar Docks Station*, told him that they remained at his order and were held by the company as warehousemen at his risk, but added, "will be sent to the *Gordon Castle*." The goods were shipped on board that vessel. The bills of lading were by *L.*'s directions made out to the order of himself or assigns, but they were never delivered to him by the shipowners, inasmuch as he did not pay the freight. The ship sailed for *Shanghai* with the goods on board. A few days previously *L.* had stopped payment, and shortly after she had sailed he committed an act of bankruptcy, upon which he was adjudicated a bankrupt. The bills of lading were still in the possession of the shipowners in *London*, of whom they were claimed by *W.* and by the trustee in the

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bankruptcy. It was arranged that the goods should be sold by the agent of the shipowners at *Shanghai*, and the proceeds of sale paid to the person who should be entitled to them :—

Held, that the agreement did not deprive *W.* of the right to stop the goods *in transitu ;* that the transit was not ended till the goods arrived at *Shanghai*, and that the demand by *W.* of the bills of lading from the shipowners was an effectual stoppage *in transitu*. Consequently, that *W.* was entitled to have the bill of exchange satisfied out of the proceeds of sale :

Held, also, that *W.* could have obtained an injunction to restrain *L.* from sending the goods to any other destination than *Shanghai :*

Held, also, that the agreement was not an instrument which required registration under the *Bills of Sale Act*.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, sitting as Chief Judge in Bankruptcy.

R. E. Love was a merchant in *London*. *W. Watson* was a manufacturer at *Gowling* in *Yorkshire*. On the 10th of February, 1876, an agreement under seal was entered into between *Love* and *Watson*. It contained recitals to the effect that *Love* had for some time purchased, and was still purchasing from *Watson, Manchester* goods for shipment to *China*, *Watson* drawing on *Love*, and *Love* accepting bills of exchange for the invoice price of the goods ; that *Love* had agreed to give *Watson* security for the payment of the bills of exchange at maturity, and for all sums which might from time to time become due from him to *Watson* upon account current, not exceeding £5000, and that in pursuance of this agreement *Love* had transferred to *Watson* certain shares in some ships of which *Love* was the owner. And it was agreed as follows :—

(1.) " *Watson* shall from time to time supply to *Love* goods according to his selection, so that he may during the continuance of this agreement have a credit to the extent of £5000, for which *Watson* shall draw upon *Love* and *Love* shall accept bills of exchange from time to time for the invoice price of such goods.

(2.) " *Love* shall ship all goods purchased under clause 1 hereof to *Rothwell, Love, & Co.*, of *Shanghai, China*, for sale on his account. The bills of lading for all such goods shall be sent by *Love* immediately on receipt by ordinary post to *Rothwell, Love, & Co.*, to whose order all such bills of lading shall be made out. *Watson* shall have a lien upon the said bills of lading and each shipment of such goods in transit outwards, or in the hands of the

consignees or any other persons, and also upon the proceeds, or produce purchased with the proceeds, of each such shipment in the hands of the consignees or any other persons, or in the transit homewards. Such lien, however, is not to be a general one, but is to extend only to the particular shipment, and shall cease when the bills of exchange which have been given by *Love* for such particular shipment shall have been paid."

(3.) "*Love* shall insure from time to time to the full value thereof, for the benefit of *Watson* primarily as such mortgagee and pledgee as aforesaid, and subject thereto for his own benefit, all the goods to be shipped as before mentioned."

Love verbally promised *Watson* that he would forthwith give *Rothwell, Love, & Co.* notice of the agreement and of its terms. No notice was, however, in fact, given to *Rothwell, Love, & Co.*, either by *Love* or by *Watson*. On the 1st of March, 1876, in pursuance of this agreement, *Love* sent an order to *Watson* for ten bales of a species of goods known as "lastings." These goods were sent by *Watson* to *James Copperthwaite*, a packer at *Bradford*, to be by him packed and forwarded to *London* for shipment. *Copperthwaite* packed the goods, and on the 20th of March, 1876, he wrote a letter to *Love*, in which he said, "I beg to hand you particulars of 10 bales, waiting your forwarding instructions." The letter contained particulars of the goods, and described the bales as 21–30, marked "

Shanghai." On the 22nd of March *Watson* sent an invoice of the goods to *Love*, headed

"Mr. *R. E. Love*,
Bought of *Wm. Watson*,"

the price of the goods being £443 10*s*. On the 23rd of March, 1876, *Love* wrote to *Copperthwaite*: "Please send the 10 bales lastings to the *Gordon Castle* loading in the *South West India Docks* for *Shanghai*. I enclose card of the vessel. I should have sent forwarding instructions before, but there was no vessel ready." In reply to this, on the 24th of March, 1876, *Copperthwaite* wrote to *Love*: "I have forwarded the 10 bales per *Great Northern* for steamer *Gordon Castle, S. W. I. Docks*, carriage paid, £2 2*s*. 7*d*.,

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at your disposal." It was admitted that the carriage was paid by *Watson*. On the 24th of March, 1876, *Watson* wrote to *Love* as follows:—

"Mr. *R. E. Love* Mar. 24, 1876.

To *William Watson*.

"March 22. To goods . . .	£443	10	0
By discount . . .	11	2	0
	£432	8	0
To 6 months' interest .	10	16	3
„ pattern books . .	0	8	9
„ stamp . . .	0	5	0
	£443	18	0

"Dear Sir,—We have to-day drawn for the above amount at 6 m/d. Please accept on presentation."

Love accepted the bill and returned it to *Watson*. The goods were forwarded by the *Great Northern Railway Company* to their *Poplar Dock Station*, and *Love* received the following advice-note from the company:—

"*Great Northern Railway*,

"*Poplar Dock Station*,

"Advice of goods. "March 25, 1876.

"Mr. *R. E. Love*.

"The undermentioned goods consigned to you having arrived at this station I will thank you for instructions as to their removal hence as soon as possible, as they remain here to your order and are now held by the company, not as common carriers, but as warehousemen, at owners' sole risk of loss or damage by deterioration or fire, and subject to the usual warehouse charges, in addition to charges now advised."

This part of the note was in print. Then followed a description of the goods, as 10 bales, from *Copperthwaite, Bradford*, marked (W. W. L.) *Shanghai*, 21/30, and it was stated that the freight was paid. There was added in writing—"Will be sent to the *Gordon Castle, S. W. I. D^k*." The goods were, on the 28th

of March, 1876, shipped on board the *Gordon Castle*, of which *Thomas Skinner & Co.* were the owners. The bills of lading were by *Love's* direction made out to the order of himself or his assigns. They were sent by him to *Skinner & Co.* for signature, and were duly signed by them on the 29th of March, 1876, and would have been delivered to *Love* upon payment of £3 13s. for freight, but they were never taken up by him, and at the commencement of his bankruptcy (to be presently stated) the bills of lading were still in the hands of *Skinner & Co.* On the 5th of April, 1876, *Love* suspended payment, and gave notice to *Watson* that he had done so. On the 6th of April one *H. F. Jörss*, of *Manchester*, at the request of *Watson*, wrote to *W. Pustan*, of *Hamburgh*, requesting him to telegraph at once to his house at *Shanghai* to attach the ten bales on their arrival there and to obtain delivery of the bills of lading, and *Pustan*, on the 8th of April, telegraphed accordingly. On the 11th of April, *Jörss*, by *Watson's* directions, telegraphed in *Watson's* name to *Rothwell, Love, & Co.*, at *Shanghai*, requesting them to deliver the goods to *Pustan & Co.*, of *Shanghai*, and on the same day *Watson* himself wrote a letter to *Rothwell, Love, & Co.*, informing them of the telegram, and referring to the agreement of the 10th of February, of which he said he had forwarded a copy to *Pustan & Co.*, at *Shanhgai*. On the 8th of April, 1876, the *Gordon Castle* sailed from *London* for *Shanghai*. On the 12th of April *Love* filed a liquidation petition, and on the 30th of May he was adjudicated a bankrupt. On the 21st of June *Everingham Smith* was appointed trustee in the bankruptcy. He had previously been appointed receiver under the petition, and had demanded from *Skinner & Co.* delivery of the bills of lading of the goods. *Watson* had also demanded the bills of lading from *Skinner & Co.* Ultimately an arrangement was made that the goods should be sold by *Skinner & Co.'s* agents at *Shanghai*, and the proceeds of sale (after deducting their charges and costs) be held by them for the persons who should be entitled to them. Application was made to the Court of Bankruptcy to decide the rights of the parties. The Registrar made an order declaring that the trustee was entitled to the bills of lading and to the proceeds of sale of the goods.

Watson appealed.

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Horne Payne, for the Appellant:—

It is said on the other side that the goods were in the order and disposition of the bankrupt at the commencement of the bankruptcy. But if the Appellant was the true owner, the bankrupt's possession was not with his consent; his possession arose from the fact that, in violation of his agreement, he had the bills of lading made out to his own order. The Appellant did all he could to determine his consent to the reputed ownership of the bankrupt, and that is sufficient: *Load* v. *Green* (1); *Smith* v. *Hudson* (2); *Ex parte Montagu* (3); *Williams* on Bankruptcy (4).

[BRAMWELL, J.A., referred to *Belcher* v. *Bellamy* (5).]

Unless, however, the Appellant was the true owner of the goods, the question of order and disposition does not arise: *Townley* v. *Crump* (6). The trustee also contends that the Appellant had no right to stop the goods *in transitu*, because the transit was ended. This argument assumes that the bankrupt was the true owner of the goods. The agreement between the parties was that the transit should continue up to *Shanghai*, and the telegrams sent by the vendor were sufficient notice of stoppage *in transitu*: *Rodger* v. *Comptoir d'Escompte de Paris* (7). *Rothwell, Love, & Co.*, to whom the goods were consigned, were *quasi* trustees for both vendor and purchaser. Another argument used against the Appellant is that the agreement giving him a lien required registration under the *Bills of Sale Act* (17 & 18 Vict. c. 36) to make it valid as against the trustee in *Love's* bankruptcy. I contend that the agreement is not within the definition of a bill of sale contained in sect. 7 of the Act unless it comes within the words "other assurances of personal chattels." But there is no decision that those words would include such an agreement. *Holroyd* v. *Marshall* (8) does not go to that extent, nor does *Edwards* v. *Edwards* (9). If, however, this agreement falls within those words, it is also within the exception of "transfers of goods in the ordinary course of busi-

(1) 15 M. & W. 216.
(2) 6 B. & S. 431.
(3) 1 Ch. D. 554.
(4) 2nd Ed. p. 103.
(5) 2 Ex. 303.
(6) 4 A. & E. 58.
(7) Law Rep. 2 P. C. 393.
(8) 10 H. L. C. 191.
(9) 2 Ch. D. 291.

ness of any trade." At any rate, the goods were not in the actual or apparent possession of the bankrupt at the time of his bankruptcy, as they were on a ship at sea, and the Appellant had a right to stop them *in transitu.*

Everitt, and *R. T. Reid,* for the trustee :—

The true meaning of the agreement is this, that the property in the goods passed to the bankrupt, and that the vendor had only an equitable charge on them as a collateral security for payment of the bills of exchange. The goods were sent to the purchaser's agent. An agreement creating such a charge comes within the terms of the *Bills of Sale Act. Ancona* v. *Rogers* (1) shews that, if the goods were in the possession of a bailee for *Love,* they were still in his possession for the purposes of the *Bills of Sale Act.* The bankruptcy took place before any notice of the claim of the vendor could have reached the consignees at *Shanghai ;* indeed there is no evidence when the telegrams reached them. An equitable mortgagee must, in order to complete his title, give notice to the person who has the custody of the property : *Ex parte Union Bank of Manchester* (2). No notice was given of the agreement to *Rothwell, Love, & Co.* before the bankruptcy. The result is that the goods were in the order and disposition of the bankrupt as reputed owner, free from any equitable charge, with the consent of the owner of the charge. And, as to stoppage *in transitu,* the transit was at an end when the goods reached the *Poplar Dock Station.* The test is this : "In what capacity are the goods held by him who has the custody ? Is he the buyer's agent to keep the goods ? or the buyer's agent to forward them to the destination intended at the time the goods were put in transit ?" : *Benjamin* on Sales (3) ; *Valpy* v. *Gibson* (4) ; *Dixon* v. *Baldwen* (5). Here the railway company were in possession as warehousemen, not as carriers. There is no evidence of any actual stoppage *in transitu.*

[They referred also to *Meux* v. *Jacobs* (6) ; *Ex parte Banner* (7) ; *Shepherd* v. *Harrison* (8).]

(1) 1 Ex. D. 285.
(2) Law Rep. 12 Eq. 354.
(3) 2nd Ed. p. 703.
(4) 4 C. B. 837.
(5) 5 East, 175.
(6) Law Rep. 7 H. L. 481.
(7) 2 Ch. D. 278.
(8) Law Rep. 5 H. L. 116.

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Horne Payne, in reply:—

The bankrupt could not be in possession of a charge on the goods with the Appellant's consent, if he was not in possession of the goods themselves with his consent.

[JAMES, L.J.:—That amounts to saying that the reputed ownership clause does not apply to equitable interests.]

The transit of the goods continued up to *Shanghai*, and indeed it is not ended yet, for the bills of lading are still in the shipowners' hands. The goods had not been, and could not have been, delivered to any one at the time when the Appellant demanded the bills of lading: *Coates* v. *Railton* (1).

Judgment, James, L.J.

JAMES, L.J.:—

Notwithstanding the length of time which has been occupied in the argument, and the great number of very nice points of law which have been raised, I am satisfied that the case ought to be determined simply upon the last point raised. Independently of any right which the vendor had under the agreement he had his original vendor's right of stoppage *in transitu* when his purchaser failed, and there is nothing in the agreement, nothing in any bargain between him and the purchaser, to take away or diminish that right of stoppage *in transitu*. Then the question is, Has he stopped the goods *in transitu?* I am of opinion that in truth and in fact the transit did continue, and was intended to continue, all the way from the railway station in *Yorkshire*, through the docks in *London*, and on board the ship up to *Shanghai*. It is quite clear that the bargain between the vendor and the purchaser, for reasons essential to the interests of the vendor, was that that should be the transit, and that was the transit actually made from the one place to the other. By railway and ship the goods were to reach *Shanghai*, and by this time, subject of course to the perils of the sea, they have reached *Shanghai*. It is said that the transit was interrupted, and that in some way a right to end it accrued to the purchaser which destroyed the vendor's right to stop *in transitu*. Certainly this was not so when the goods reached the packer's hands. The packer was employed by the vendor

(1) 6 B. & C. 422.

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to pack the goods, and when they arrived at the railway station in *London*, no doubt the railway company, being both warehousemen and carriers, said to the purchaser: "We hold the goods at your disposal." But the goods were marked "*Shanghai*," and were sent to the company for the purpose of being delivered by them to the *Gordon Castle*, and in that very advice-note in which they ask the purchaser for orders, and say, "We hold the goods at your risk," they add this, "Will be sent to the *Gordon Castle*." Therefore it is quite clear they must have received notice at that time that the *Gordon Castle* was the proper destination, and the goods themselves were marked with the word "*Shanghai*." Therefore that was the rightful course, the course which the goods ought to have taken, and we must consider that the rightful course was intended to be taken, and was taken, that is, to send the goods on to *Shanghai*. Of this I am quite certain, that, if the vendor had found out that the goods were going to be sent anywhere else, that they were going to be diverted from the ship bound to *Shanghai*, he could have applied at once to the Chancery Division of the High Court, and would have been entitled to obtain, and would have obtained, an injunction to prevent the goods being sent in any other mode or to any other place. That, therefore, being the *transitus*, has it been stopped? It so happens, luckily for the vendor, that the documents of title have never left the shipowners' possession, they are found in their possession owing to the freight not being paid. The goods were in their possession when the bankruptcy commenced, and no one has acquired any right to take them out of the shipowners' hands, and while they are on board the ship with no valid right in any one to take them out of the shipowners' possession, the vendor comes to the shipowners and says, "Deliver the goods to me," and the shipowners have undertaken to sell the goods and hand over the proceeds of sale to the real owner. I am of opinion that the goods have been effectually stopped *in transitu*, because the shipowners are to sell them and deal with the proceeds according to the legal and equitable rights of the parties. If the vendor had gone out in time he could have stopped the goods *in transitu* before they were delivered out of the ship at *Shanghai*, but he is relieved from that trouble by the fact of the shipowners being here, and saying, We will sell them for the rightful owner. I am of opinion that there

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was a right to stop *in transitu*, and that there has been *de facto* a stoppage *in transitu*, which completes the title of the owner of the goods, who has sold them to a person who has become bankrupt since he delivered them. That, I think, is sufficient to dispose of the real point in the case.

Judgment, James, L.J.

There is really nothing in the other points which have been argued. We are all clearly of opinion that this agreement is not within the *Bills of Sale Act*. The point has been very much argued, and we think it right to say that, having regard to the words and the spirit of the *Bills of Sale Act*, a contract of this kind is not "a bill of sale or other assurance of personal chattels whereby the grantee or holder has power to seize or take possession of any property" within the meaning of the Act. It gives a right connected with the vendor's lien, but it is certainly not a bill of sale of personal chattels within the meaning of the Act.

The other point was as to reputed ownership. If the case depended upon that, it is quite clear that the bankrupt was the true owner of the goods, but he was the true owner of them subject to an equitable charge, and certainly, in my opinion, that equitable charge could have been impeached by reason of there being nothing whatever to shew that the owner of the goods was not the owner of them absolutely free from any incumbrance. That is to say, the true owner of the equitable charge or equitable interest is bound to shew that the actual possessor of the goods is in some way prevented from holding himself out to the world as being the owner of them free from any trust, incumbrance, or charge. It seems to me that the Appellant's case, if it depended upon that, would have failed. However, it is sufficient to say that he has succeeded upon the question of stoppage *in transitu*.

Baggallay, J.A. BAGGALLAY, J.A.:—

I am of the same opinion. So far as the duration of the *transitus* is concerned I am quite unable to distinguish the facts of this case from those of *Rodger* v. *Comptoir d'Escompte de Paris* (1). There it was held that the *transitus* continued so long as the goods were in the charge of a third party who had been contracted with as carrier for the purpose of forwarding them. Applying the decision in that case to the present case, it would follow that these goods

(1) Law Rep. 2 P. C. 393.

would have remained *in transitu* until such time as they had arrived at *Shanghai*, and were delivered over there by the shipowners. It has, however, happened, by reason of the bills of lading never having been sent from *England*, that there was no person in *Shanghai* to whom the goods could have been delivered, and consequently they remained in the possession of the carriers, and the *transitus* was therefore not completed. Before the *transitus* was completed, if indeed it has yet been completed, an arrangement was come to by all the parties, that is, the trustee of the bankrupt, *Watson*, and the shipowners, that the goods should be sold, and the proceeds disposed of according to the rights of the parties as they existed at the time when the agreement was entered into. I think, therefore, that the goods have been in substance stopped *in transitu*.

Judgment, Baggallay, J.A.

BRAMWELL, J.A.:—

Bramwell, J.A.

I am entirely of the same opinion, and for the same reasons. The only observation I wish to make is upon the question of stoppage *in transitu*. Undoubtedly the goods have been stopped *in transitu* if the *transitus* lasted until the goods reached *Shanghai*. Now, what are the facts? The goods are in the possession of *Copperthwaite*, an agent of *Watson*, the seller, and by the direction of the bankrupt, the purchaser, they set out on a journey which was to begin at *Bradford* and end at *Shanghai*, where they were to be delivered to a firm who would have been under an obligation to *Watson* if he had thought fit to give them notice of his rights. The goods set out on that journey, and no further instructions were required, nor was anything further necessary from the beginning to the end of the journey except the procuring of the bills of lading and so forth. It seems to me, if there is any reason in the doctrine of stoppage *in transitu*, the *transitus* in this case was from *Bradford* to *Shanghai*, and, as Sir *Richard Baggallay* has said, I cannot distinguish this case from *Rodger* v. *Comptoir d'Escompte de Paris* (1).

Solicitor for Appellant: *Walter Webb.*
Solicitors for Trustee: *Murray, Hutchins, & Co.*

(1) Law Rep. 2 P. C. 393.

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Ex parte GOOD. *In re* ARMITAGE.

Release of one Joint Debtor—Ostensible Partner—Surety—Proof in Bankruptcy—Rejection by Trustee—Delay—Bankruptcy Rules, 1870, *rr.* 72, 73, 287, 313.

J. gave to a bank a guarantee for £1000 in favour of *A. & Co.*, representing at the same time to the bank manager that he was a partner in that firm, but that he wished the fact of his partnership to be kept secret. The guarantee described him as a partner in the firm. Some time afterwards *A.* alone, as *A. & Co.*, filed a liquidation petition, and the bank tendered a proof in the liquidation for advances which they had made to *A. & Co.* after the guarantee. After this the bank sued *J.* at law for £5659, alleging him to have been a partner with *A.* *J.* filed a bill in Chancery to restrain the proceedings in the action, denying the alleged partnership. A compromise was entered into between the bank and *J.*, by which £2818 was paid to them in satisfaction of their claim against *J.* and of a claim which they made against *S.*, who had also given them a guarantee on behalf of *A. & Co.* *J.'s* guarantee was given up to him, a receipt for £1000 being indorsed on it by the bank manager "in payment and discharge of the within guarantee, and also of all claims against *J.* in reference to or in connection with *A. & Co.*":—

Held, by the Court of Appeal, that *J.* must be taken to have been an actual partner with *A.*, but that the receipt did not operate to release *J.* so as to preclude the bank from maintaining a proof against *A.'s* estate.

Per Bacon, C.J.: Though a creditor has a right to sue jointly with his debtor a person who has held himself out as a partner with the debtor, yet, as between themselves, the ostensible partner is a surety only, not liable to contribution, and therefore a release of the ostensible partner by the creditor does not release the debtor.

The bank's proof was sent to the trustee in December, 1872. In December, 1875, he gave notice that he rejected the proof, alleging as an excuse for the delay that he had only recently discovered the facts which justified the rejection:—

Held, by *Bacon*, C.J., that it was too late for the trustee to give such a notice, but that he ought to have applied to the Court to expunge the proof.

Statement.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

In the month of August, 1870, *John Armitage*, who was about to engage in business as a shoddy manufacturer at *Dewsbury*, was desirous of obtaining a credit of £1000 from the *Halifax Joint Stock Banking Company*. The bank refused to give him this credit unless he could procure them a guarantee for the amount.

Thereupon he induced *John Smythies* to give the required guarantee, and on the 23rd of August, 1870, he and *John Smythies* went together to the bank and had an interview with Mr. *John Fisher*, the manager. According to *Fisher's* evidence it was then represented to him by *Armitage* and *Smythies* that they were about to enter into partnership, but *Smythies* said that he particularly wished that his name should not be disclosed, and requested that it might be kept secret. *Smythies* denied that he made any such representations to *Fisher*, and denied also that he was ever in fact a partner with *Armitage*. The following guarantee was, however, signed by *John Smythies*:—

"*Halifax*, 23rd August, 1870.

"To the Directors of the *Halifax Joint Stock Banking Company*.

"Gentlemen,

"In consideration that you will open a banking account with *John Armitage* and *John Smythies*, of *Bradford Road, Dewsbury*, and make advances to them, and give credit to them by discounting bills or otherwise, I hereby guarantee the payment of the balance which may, on the closing of such account, be or become due to you from the said *John Armitage* and *John Smythies*, individually or in partnership with any other person or persons, to the extent of £1000. And I agree that, in default of payment of the balance due on the said banking account by the said *John Armitage* and *John Smythies*, you shall be at liberty, if you think fit, to receive and place to the credit of such account all such moneys, whether in the shape of payments, compositions, dividends, or otherwise, as may be recovered from the said *John Armitage* and *John Smythies*, or from their estate, or from any collateral securities, and, after giving credit for the same, the balance that may then remain shall be recoverable under this guarantee, and any liabilities you shall be under by reason of your having put your names to any bills or in any way guaranteed the same for the said *John Armitage* and *John Smythies* may be reckoned as part of such balance, notwithstanding such liabilities may at the closing of the account be outstanding. But it shall not be incumbent on you to enforce any payment from the said *John Armitage* and *John Smythies*, or from their estate, or from any collateral securities, before requiring me to pay the balance due on

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closing the account, which account you shall be at liberty to close whenever you may think proper; nor shall you be prejudiced by making any arrangement or composition you may think proper with the said *John Armitage* and *John Smythies* without first obtaining my consent thereto. And this guarantee is to extend to the *Halifax Joint Stock Banking Company* for the time being, of whomsoever composed, and to the house or firm of *John Armitage* and *John Smythies* as *John Armitage & Co.*, of whomsoever it may consist. I am, gentlemen, your obedient servant,

(Signed) "*John Smythies.*"

After this advances were from time to time made by the bank to *John Armitage & Co.*

On the 8th of October, 1870, another guarantee in a similar form for £2000 was given to the bank by one *Joseph Smythies* in favour of the firm of *John Armitage & Co.*

On the 11th of November, 1872, *John Armitage*, as *John Armitage & Co.*, filed a liquidation petition signed by himself alone, and not stating that he had any partner.

The first meeting of the creditors was held on the 4th of December, 1872, and a resolution was passed to liquidate by arrangement; a committee of inspection was appointed, Mr. *J. D. Good* was appointed trustee, and the immediate discharge of the debtor was granted. On the same day the bank tendered a proof for £4229 7*s.*, to which no objection was then made, and they voted in respect of it at the meeting. The bank in the meantime pressed *John Smythies* for payment, claiming much more than the amount of the guarantee, and on the 2nd of May, 1873, they issued a writ against him alone to recover the sum of £5659 16*s.* 3*d.* On the 27th of June, 1873, *John Smythies* filed a bill in the Court of Chancery, praying that the action might be restrained, and that the guarantee might be delivered up to be cancelled or otherwise rectified according to the true intention of the parties. The bill denied that there was any partnership between *Armitage* and *John Smythies*, and charged fraud. The Court granted an injunction on the terms that the Plaintiff should pay the sum claimed into Court, which he did on the 16th of September, 1873. A compromise of the action was entered into between *John Smythies* and the bank, by which the bank consented to take the sum

of £2818 9*s.*, part of the money in Court, in satisfaction of their claim against *John* and *Joseph Smythies*, though the latter was not a Defendant to the action. A receipt was indorsed on the guarantee of *John Smythies* in these words, "Received the 16th of September, 1873, from the within named *John Smythies* the sum of £1000 in payment and discharge of the within guarantee, and also of all claims against him in reference to or in connection with *John Armitage & Co.* (Signed) *John Fisher.*" A receipt in similar terms for £1818 9*s.* was indorsed on the guarantee of *Joseph Smythies.* On the 1st of September, 1873, the bank sent to the trustee a further proof against the estate of *John Armitage & Co.* for £1430 9*s.* 3*d.* This proof was not then objected to. Pending these proceedings, some among the other creditors of *John Armitage & Co.* conceived suspicions that a partnership had subsisted between *John Armitage* and some other persons, and in particular the two *Smythies.* *John Armitage* himself was interrogated, but he denied that he had had any partner. Ultimately the committee of inspection, by a resolution dated the 18th of December, 1873, instructed their solicitor, Mr. *Ibberson,* to investigate this question of partnership. Several meetings took place, and ultimately Mr. *Ibberson* put himself into communication with Mr. *Fisher,* who referred them to Mr. *Franklin,* the then solicitor of the bank. About the same time similar inquiries were pushed by Mr. *Hemingway,* who was acting for the *West Riding Bank,* and an action was commenced against *John Smythies,* which was afterwards stayed. At length the committee of inspection, conceiving that they would be able to establish a partnership between both the *Smythies* and *Armitage & Co.,* commenced an action against the *Smythies* in the name of one *Jubb,* a creditor of the firm of *John Armitage & Co.,* to recover the sum of £89 3*s.* 2*d.* This action came on for trial on the 3rd of August, 1875, at the assizes at *Leeds,* but before the trial was concluded the following arrangement was come to, and an order of the Court was made that the parties thereto acting for the Plaintiff, viz., the trustee, Mr. *Ibberson,* Mr. *Walker,* and others, should use their best endeavours to bring about an arrangement on the terms "that the Defendants shall pay to the trustee £2000, and to the Plaintiff £600 for costs, which the scheduled creditors shall accept in full discharge of all the sche-

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duled claims and of all demands and costs against the Defendants." If these terms were not accepted by the scheduled creditors on or before the 12th of September, 1875, the Defendants were not to be bound to pay the £2000 and £600, but in lieu thereof they were, on or before the 19th of September, 1875, to pay to the Plaintiff in the action the sum of £89 3*s.* 2*d.* claimed and £550 for taxed costs in satisfaction of all claims. There was also a provision that, in the event of the compromise not being agreed to and the lesser sum being paid, the arrangement was to be regarded as a compromise and not as an admission of liability. The creditors, however, accepted the terms offered, and the action was settled. It was at this trial on the 3rd of August, 1875, that the trustee and the committee of inspection learned for the first time the precise terms on which the previous action by the bank against *John Smythies* had been settled on the 16th of September, 1873. In December, 1875, the trustee gave notice to the bank that their proofs sent in in 1872 and 1873 were rejected. The bank thereupon served upon the trustee a notice of motion that the proofs should be admitted. The Judge held that the trustee was not estopped by any laches from rejecting the proofs of the bank. He was also of opinion that it was established by the evidence that a partnership had in fact subsisted between *Armitage* and the two *Smythies*, or at any rate, between him and *John Smythies*, and that therefore the bank, by releasing *John* and *Joseph Smythies*, had also released *Armitage*. His Honour, therefore, affirmed the decision of the trustee rejecting the proof, and dismissed the application of the bank. The bank appealed to the Chief Judge. The appeal was heard on the 6th of November, 1876.

Statement.

Argument.

De Gex, Q.C., and *West*, for the Appellants :—

Our first objection is that the trustee was too late in rejecting our proofs. The first was formally admitted at the first meeting of the creditors, and we voted in respect of it. The second proof was sent to the trustee in September, 1873. He did not give his notice of rejection until December, 1875. This was too late : Bankruptcy Rules, 1870, rr. 72, 73, 313; *Ex parte Kemp* (1). The trustee ought himself to have applied to the Court to expunge the proofs.

(1) 42 L. J. (Bkcy.) 26.

Our main contention is that the release of the *Smythies* did not release *Armitage*. It is clear that *John Smythies* held himself out to the bank as a partner with *Armitage*, and therefore he was liable to them as such. But there is nothing to shew that there was any partnership in fact: it is expressly denied by *Armitage* and *John Smythies*. The reason why the release of one of two joint debtors operates to release the other is that, if the one who has not been released is sued, he has a right to enforce contribution from the other, and if that right remained the release would not be a complete one. Consequently it has been held that if the one is released the other is thereby also released. But this reasoning does not apply to the case where a man is jointly liable with another only because he was an ostensible partner, for in such a case the other debtor would have no right to enforce contribution from his ostensible partner. The reason for the rule not existing, the rule does not apply. The County Court Judge founded his decision upon *Nicholson* v. *Revill* (1), but that was the case of a discharge of one of three persons who had given a joint and several promissory note. The reason of the general rule is clearly explained by *Patteson*, J., in *North* v. *Wakefield* (2). In construing the alleged release the Court will regard the intention (*Watters* v. *Smith* (3)), which in the present case was clearly only to release the *Smythies*. The receipts on the guarantees do not amount to more than covenants not to sue. *Webb* v. *Hewitt* (4), rightly understood, is not against us.

BACON, C.J.:—It would be merely idle to decide the case on the first objection. This would lead to further delay, for the trustee would only have to adopt a new form of procedure.

Winslow, Q.C., and *E. C. Willis*, for the trustee:—

The original agreement with the bank was clearly a joint one.

[BACON, C.J.:—It is not an uncommon thing for a creditor to take a separate security from one partner.]

On the evidence we contend that an actual partnership between *Armitage* and the two *Smythies*, or, at any rate, between him and

(1) 4 A. & E. 675.
(2) 13 Q. B. 536, 541.
(3) 2 B. & Ad. 889.
(4) 3 K. & J. 438.

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John, is established. The bank ought to have proved the debt in the liquidation as a joint one, and in proving it as a separate one only they have acted in bad faith. In their second proof they make no mention of the sum they were to receive from the *Smythies*, and they say that they have no security for their debt. *Nicholson* v. *Revill* (1) is in our favour. It is true that, where an intention is manifested by a creditor who releases one of two joint debtors not to release the other, the Courts have construed the release as amounting only to a covenant not to sue, but the intention must be clearly manifested. In the present case there was no reservation of the rights of the bank against *Armitage;* quite the contrary. In *North* v. *Wakefield* (2) there was an express reservation. In *Ex parte Slater* (3) it was held that a proof in the bankruptcy of one joint debtor, after receiving a composition from the other, must be expunged. In *Watters* v. *Smith* (4) the receipt given was not in full satisfaction. As between *John Smythies* and the bank it is clear that the bank intended that there should be a complete end of the matter, to discharge him altogether.

De Gex, in reply, referred to *Price* v. *Barker* (5).

Judgment, C. J. B.

1876. Nov. 13. BACON, C.J., after stating the facts in substance as above, continued:—

The contention of the trustee before the County Court Judge, under these circumstances, was that a partnership had existed between *John Armitage* and *John Smythies*, and that the terms of the receipt given by the banking company to *John Smythies* amounted to a release of the joint debt, and that the right to prove against the estate of *John Armitage*, one of the joint debtors, had become thereby forfeited. The learned Judge adopted this view of the case, and held that *Armitage* and *Smythies* were partners, and, overruling the objection of the bank, founded on the length of time which had elapsed since the proofs had been admitted without dispute, he dismissed the bank's motion with

(1) 4 A. & E. 675.
(2) 13 Q. B. 536, 541.
(3) 6 Ves. 146.
(4) 2 B. & Ad. 889.
(5) 4 E. & B. 760, 777.

costs, on the ground that the bank, by releasing one of the partners, had lost their right of recourse against the estate of the other.

Now, after considering the facts as they appear in the evidence and are admitted, I must say that I am unable to concur in the judgment which has been pronounced. *Armitage* and *John Smythies* have each of them deposed that *de facto* there was no partnership at any time between them, and their statements are in no respect contradicted. The conduct of the trustee and the committee of inspection corroborate the fact so stated. If there had been such a partnership it would have been the duty of the trustee to keep distinct accounts of the joint estate of the partnership which came to his hands, and of *Armitage's* separate estate, and to have administered those estates according to the rights of the several creditors. It does not appear that he did anything of the kind. It seems that he and the committee of inspection had a notion from the beginning that *Smythies* was jointly liable with *Armitage* in respect of some, if not all, of the debts which were admitted to proof. That *Smythies* was so liable to the banking company, although he was not a partner, does not admit of doubt, but, until about three years after the liquidation petition, the trustee took no steps to enforce any right against *Smythies*, and when he at length did so by means of the action in the name of *Jubb*, that action was compromised, the trustee thereby obtaining from *Smythies* a sum which was carried to the estate of *Armitage*.

If the case depended wholly upon the point arising out of the delay of the trustee, I should be of opinion that it was covered by the decision of the Court of Appeal in *Ex parte Kemp* (1), and I think it would be not only at variance with that explicit decision, but would be a most dangerous relaxation of the rules and the course of procedure in bankruptcy, to permit trustees to delay the performance of that which they must know to be their plain duty, upon the ground that they had no sufficient information on which they could proceed. The trustee and the committee in the present case might, by examination of *Armitage* and *Smythies*, and of the manager of the bank, and by other means, have satisfied themselves of the truth of the case.

(1) 42 L. J. (Bkcy.) 26.

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I am unwilling, however, to dispose of the appeal before me upon that ground. Nor have I thought it necessary to entertain the Appellants' objection (although I think it is well founded), that the trustee ought, if he thought he had ground for disputing the proofs, to have applied for an order to expunge them. I therefore suggested to the Appellants that it would be better to proceed with the case upon the materials which were before the Judge of the County Court, inasmuch as the Appellants' success on the objection, which is technical merely, would only lead to further delay and expense, without determining the real question between the parties, and on both sides this suggestion has been adopted.

The real question is whether or not the Appellants have lost their right to maintain their proofs by reason of the receipt which was given to *Smythies* upon the banking company receiving the sum which was paid by him in September, 1873. In considering that question, I cannot adopt the conclusion that any partnership existed between him and *Armitage*. A partnership can only be formed by contract between the parties—a *consensus* is indispensable. I find it in this case proved that there was no such *consensus*. That *Armitage* and *Smythies* had contemplated a partnership may be taken as established by the evidence of Mr. *Fisher*, but that they ever carried that intention into effect, what were the terms of the partnership, in what shares, or for what duration, there is not only no evidence, but there is no statement or explanation applicable to the subject. That they contracted joint liabilities is clear beyond doubt; but the difference between a partnership proper and such representation or dealing as would make a man jointly liable with another is palpable. In the one case, no matter what was the extent or nature of his interest, he is liable, without limit or qualification, to all the creditors of the partnership. In the other he is liable to all the persons who may have given credit to his representations, or may have acted in the belief occasioned by his conduct that he was a partner. In the one case he is a principal debtor. In the other, although as much liable as if he were a principal debtor, he is only liable as between himself and the person with whom he has permitted his name to be used and his credit to be engaged in the character of a surety, and no action for contribution by the principal debtor against

him could possibly arise. In the judgment appealed from, this distinction has not been observed, and yet, as it appears to me, it is of essential importance in considering the effect of what has been called a release of the joint debt.

Now, in point of law, it is not to be disputed that a release to one of several joint debtors releases them all. The case of *Nicholson* v. *Revill* (1) is one of the many instances in which this rule of law has been applied, and the reason upon which the rule is founded is as clear and as plain as the rule itself. It is to prevent circuity of action, inasmuch as if the released debtor were still liable to an action for contribution by his co-debtor (who had been sued and had paid), he would not be in fact released: *North* v. *Wakefield* (2). But this principle has no application to the present case; for *Armitage*, being by the resolution of the creditors released from all his debts, could neither sue himself nor could his trustee sue on his behalf, even if the supposed partnership had existed, although the rights of the joint creditors against the other joint debtor would be unaffected by the bankruptcy by sect. 50 of the *Bankruptcy Act*, 1869.

But, although the general rule as to releases given to joint debtors, whether partners or not, is such as I have stated, each particular release is to be construed according to the plain intention of the parties: *Watters* v. *Smith* (3). Now what was the manifest intention of the parties here? The banking company had proved against *Armitage's* estate for the whole amount of their debt, and their proof had been admitted, and *Armitage* was by the resolution of the creditors discharged. The bank was content to accept from *John Smythies*, and he was willing to pay, £1000, the amount mentioned in the guarantee. The validity and effect of the guarantee was a subject of litigation between the bank and *Smythies*, and, without adverting to the grounds alleged by *Smythies* in his bill, and on which he founded his title to relief, it cannot be disputed that the construction of the instrument itself was open to question, although, even if it were to be read only as a security limited to £1000, the representations made by *Smythies* to the bank manager might establish as against *Smythies* a liability jointly with *Armitage*

(1) 4 Ad. & E. 675. (2) 13 Q. B. 536, 541.
(3) 2 B. & Ad. 889.

C. A. 1877 *Ex parte* GOOD. *In re* ARMITAGE. Judgment, C. J. B.

for the whole balance due on the banking account, These questions between them being open, the bank, having proved against *Armitage*, and having released him, are content to take from *Smythies* the whole amount mentioned in the guarantee in full discharge of all that they could claim against him. It would, in my opinion, to use the words of the Lord Chief Justice in *Watters* v. *Smith* (1), be "contrary to the intention of the parties, and wholly unjust," to hold that in the existing circumstances it was the intention of the banking company to do more than to limit their claim against *Smythies* to the £1000 mentioned in the guarantee, and, upon receiving that sum, to forego any further claim against him in respect of any liability he might be under, or that the intention of *Smythies* was to do any more than to give up his contention as to the guarantee (which he had filed a bill to set aside) upon the condition that the bank would undertake not to sue him in respect of any claim arising out of their dealings with *John Armitage & Co.*

I am, therefore, of opinion that the order of the County Court ought to be discharged, and that an order ought now to be made upon the trustee for payment of the dividends upon the two proofs which have been admitted, and that the Appellants' costs, as well in the County Court as of this appeal, should be paid by the trustee.

C. A.

From this decision the trustee appealed. The appeal was heard on the 22nd of February, 1877.

Argument.

Winslow, Q.C., and *E. C. Willis*, for the Appellant, contended, upon the evidence, that an actual partnership had existed between *Armitage* and *John Smythies*.

De Gex, Q.C., and *West*, for the bank.

THE COURT (*Jessel*, M.R., *James*, L.J., and *Baggallay*, J.A.) held, upon the evidence, that the bank were estopped from saying that there had not been an actual secret partnership between *Armitage* and *John Smythies*, and that for the purpose of the appeal it must be taken that an actual partnership had existed.

(1) 2 B. & Ad. 889.

De Gex, Q.C., and *West*, for the bank:—

Our proofs ought not to be rejected altogether: Bankruptcy Rules, 1870, r. 287. We are entitled to prove against the joint estate, if any. The trustee ought to keep separate accounts of the joint estate, and of the separate estate of *Armitage*. It may turn out that there is nothing but joint estate.

But we contend that the receipt on the guarantee did not operate as an absolute release of *John Smythies;* it is nothing more than a covenant by the bank not to sue him. In construing such an instrument the Court always has regard to the intention of the parties, and the surrounding circumstances: *North* v. *Wakefield* (1); *Watters* v. *Smith* (2). The reason of the rule that the release of one joint debtor releases the other is explained by *Patteson*, J., in *North* v. *Wakefield*, to be that, if it was not so, the other, if sued, would have a right to enforce contribution from the first, and he would not be completely released. If there is no such right of contribution the general rule does not apply.

[JESSEL, M.R.:—Is there any authority for saying that an actual release of one of two joint debtors does not necessarily release the other, there being no reservation of the right to sue the other? You must, at any rate, shew an intention to reserve that right. I believe that the rule had its origin in the old feudal rule that the release of one joint tenant operated to release the other. It is very dangerous for modern Judges to endeavour to find modern reasons for these old rules.]

The rule cannot go to this extent, that the release of one joint debtor necessarily releases the other; if it did, the release of a surety would release the principal.

[JESSEL, M.R.:—Would not that be the result at law if it did not appear on the face of the bond that he was only a surety?]

This document is in form only a receipt, and it cannot be conceived that the bank intended to deprive themselves of the proofs which they had already made against the estate of *Armitage*.

Moreover, the liquidation petition had been filed before the receipt was given, consequently at that time the bank had no

(1) 13 Q. B. 536.

(2) 2 B. & Ad. 889.

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right to sue *Armitage*, they had only a right to share in the distribution of his estate.

[JESSEL, M.R.:—The liability had been severed; there was no longer any joint liability.]

The solvent partner would have been entitled to have the joint estate administered before the bank had recourse to him. As to the £2000 recovered in *Jubb's* action, the bank have never insisted that they have any right to share in that.

Winslow, Q.C., and *E. C. Willis*, for the trustee:—

Fisher in his affidavit in support of the bank's proof, swore that *Armitage* alone was indebted to the bank. The trustee was right in rejecting such a proof. No doubt a joint creditor may come in and prove in the separate liquidation of one of the partners, but he must come in as a joint creditor, and not representing himself to be a separate creditor. If the bank are only allowed to prove now, they will have to give credit for what they have already received on account of their debt.

[JESSEL, M.R.:—It appears that the estate only amounts to £1600 besides the £2000 recovered in *Jubb's* action.]

Watters v. *Smith* (1) is distinguishable. The principle of the rule is that by the release of one joint debtor the debt is gone: *North* v. *Wakefield* (2); *Nicholson* v. *Revill* (3); *Webb* v. *Hewitt* (4); *Coke* upon *Littleton* (5). We contend that the receipt operated as an accord and satisfaction of the whole debt. At any rate, the bank cannot be entitled to share in the £2000 recovered in *Jubb's* action, as they had already compromised with both the *Smythies*.

Judgment, C. A. Jessel, M.R.

JESSEL, M.R.:—

The main point we have to consider is, what was the effect of the receipt given by Mr. *Fisher* on behalf of the bank on the 16th of September, 1873,—did it operate to release the estate of *Armitage*, which was then in liquidation, from the claim of the bank? It appears to me that that was not its operation. After all, this is not a release properly so called, that is, a release by deed; it is

(1) 2 B. & Ad. 889.
(2) 13 Q. B. 536.
(3) 4 Ad. & E. 675.
(4) 3 K. & J. 438.
(5) 232 a.

in form a receipt, and, like all other documents not under seal, it must be construed with reference to the surrounding circumstances, of which there is evidence not contradicted. Now what were those circumstances? *Armitage* had filed a liquidation petition, and a proof had been made by the bank against his estate, which at that moment was not disputed though it had not been formally admitted. The bank had brought an action against *John Smythies*, who had filed a bill in equity to restrain the action, disputing his liability, disputing the fact of partnership, and disputing the alleged representation of partnership,—disputing his liability altogether. Then the action was compromised by the bank taking a sum of money equivalent to 10*s.* in the pound on their claim. Now what is the meaning of compromising with *Smythies*? Surely it means to compromise the dispute with him, leaving the bank's claim against *Armitage's* estate in the liquidation untouched. The claimants never intended to do more than to take as much as they could get from *Smythies* towards their demand, and when we look at what they did, and at the form of the receipt, I think it is pretty clear that nothing more was intended. It is, "Received this sum of money in payment and discharge of the within guarantee"—it is a specific guarantee—"and also of all claims against him in reference to or in connection with *John Armitage & Co.*" Now what is the meaning of these words? Why it was alleged by the bank, first, that he was a partner with *Armitage*, and, secondly, that whether he was so or not he had held himself out as being a partner. That was the nature of their claim against him. It was in reference, therefore, to that dispute. That is the meaning of it; we are compromising the dispute with you for this sum of money; but the very nature of it shews that they only had in their minds an intention to compromise their claim against him, and not to destroy the proof which they had already made against the estate of *Armitage*. In fact, when we look at the surrounding circumstances of the case they appear to me stronger than those in any of the cases which have been cited, in some of which certainly instruments in writing were construed most favourably for the creditor, having regard to the manifest intention of the parties as evidenced by the surrounding circumstances. The bank, therefore, are entitled to retain their proof.

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Judgment, C A. Jessel, M.R.

The remaining question is, what is to become of the £2000 which was obtained in the action brought in the name of *Jubb* against the two *Smythies?* It is not really claimed by the bank, and, if it was, I think the claim could not be substantiated, because they had already compromised with the two *Smythies*, and therefore they could not possibly claim a share of money afterwards obtained from them. That would have been a gross breach of faith, and it appears to me that such a claim could not have been maintained. Therefore, though the proof is admitted, the £2000 obtained from the two *Smythies* in *Jubb's* action must be set apart and applied only to the debts of the other creditors, irrespective of the bank, leaving the other creditors and the bank to go against the remaining assets.

The only other question is that of costs, and as to this we think that the order of the Chief Judge should be discharged, and that, looking at the circumstances under which this claim was brought forward originally, and the kind of evidence by which it has been sought to be maintained, the right course will be to give no costs to the bank, either in the County Court or before the Chief Judge or in this Court, and to allow the trustee his costs out of the general estate, that is, the estate exclusive of the moneys recovered from the Messrs. *Smythies.*

James, L.J. JAMES, L.J.:—

In the view which we take of the case it is not necessary to keep distinct accounts of the joint and separate estate. It will all be dealt with as it originally stood.

Baggallay, J.A. BAGGALLAY, J.A.:—I agree.

Solicitor for Trustee: *C. Walker*, agent for *J. Ibberson, Dewsbury.*
Solicitors for Bank: *Layton & Jaques*, agents for *Watson & Dickons, Bradford.*

Ex parte GARRARD. *In re* LEWER.

C. A.
1877
March 1.

Trust Fund—Assignment—Notice—Priority—Trustee himself an Assignee—Practice—Time for Appealing—Bankruptcy Appeal—Rules of Court, 1875, *Order* LVIII., *rr.* 9, 15—*Bankruptcy Rules*, 1870, *r.* 143.

W. and *A.* were appointed joint receivers in a partnership suit, and were ordered (after payment of costs) to pay the residue of the moneys received by them to the partners according to their respective rights. *L.*, one of the partners, afterwards assigned his share of the moneys to *W.*, in consideration of advances made by him. After this *L.* signed an order to *W.*, requesting him "to pay the balance of money due to me" to *G.* *W.* accepted this order in writing, undertaking thereby to pay "the balance due to you" to *G.*:—

Held, upon the construction of this acceptance, and upon the evidence, that "the balance" intended was the balance remaining after satisfying *W.'s* own claim.

Decision of *Bacon*, C.J., affirmed.

The time for appealing to the Court of Appeal from decisions of the *London* Court of Bankruptcy is now regulated entirely by the Rules of Court, 1875, and not by the Bankruptcy Rules.

Therefore, where the appeal is from an order actually made, the twenty-one days for appealing runs from the signing, not from the pronouncing, of the order.

Statement.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy, which is reported (1).

As the judgment of the Court of Appeal proceeded upon a different ground, it is necessary to state a few additional facts.

It appeared that the sum of £697 1*s.* 11*d.*, which *Lewer* owed to *Wilkes* when the order of the 6th of September, 1875, was given, was made up of sums amounting to £391 18*s.* which *Wilkes* had, in June and July, 1875, advanced to *Lewer* in anticipation of his share of the funds realized by the receivers in the Chancery suit, and of a sum of £305 3*s.* 11*d.* which *Lewer* had collected on behalf of the partnership estate, and which he was unable to pay over to the account of the receivers. *Wilkes*, at his request, agreed to pay this sum for him upon his giving him the order of the 6th of September, and *Wilkes* paid the sum to the account of the receivers on the 14th of September.

(1) 4 Ch. D. 101.

C. A. 1877 *Ex parte* GARRARD. *In re* LEWER.

Statement.

Wilkes deposed that, when *Lewer* requested him to accept the order of the 18th of September in favour of *Garrard & Bartram*, the request made was for an order on the balance payable to *Lewer* after satisfaction of *Wilkes'* own claim. *Wilkes* said that he then examined into the matter, and estimated that there would be, as *Lewer* had already told him, a balance of between £1200 and £1300 coming to *Lewer* when the suit was wound up, and that that would leave about £500 after satisfying *Wilkes'* own claim. *Wilkes* also said that *Lewer* told him that he had informed *Garrard & Bartram* of the position of the matter, and of the advances which *Wilkes* had made to him. This latter statement was not contradicted by *Garrard & Bartram*. The debt due from *Lewer* to *Garrard & Bartram* had been contracted before the order of the 18th of September was given by him.

Garrard & Bartram appealed from the order of the Chief Judge, which reversed the previous decision of the County Court Judge in their favour. The order of the Chief Judge was pronounced on the 13th of November, 1876. It was not signed until the 30th of November. The notice of appeal was given on the 16th of December.

Argument

Roxburgh, Q.C., *E. C. Willis*, and *J. Henderson*, for the Appellants.

De Gex, Q.C., and *Finlay Knight*, for *Wilkes*, objected that the appeal was too late. Under rule 143 of the Bankruptcy Rules, 1870, an appeal from an order of the Chief Judge must be entered within twenty-one days from the order. This has been construed to mean twenty-one days from the pronouncing of the order: *Ex parte Hinton* (1). Sect. 18 of the *Judicature Act*, 1875, provides that the rules as to bankruptcy appeals are to remain in force except so far as they are expressly varied, and it cannot be taken that they are varied by Rules of Court, 1875, Order LVIII., rules 9, 15.

THE COURT (*Jessel*, M.R., *James*, L.J., and *Baggallay*, J.A.) held that rule 143 of the Bankruptcy Rules, 1870, is expressly varied by rules 9 and 15 of Order LVIII., and that the twenty-one days

(1) Law Rep. 19 Eq. 266.

run from the signing of the order. They therefore overruled the objection.

The argument then proceeded on the merits.

Roxburgh, Q.C., *E. C. Willis*, and *J. Henderson*, for the Appellants:—

Wilkes allowed the Appellants to go on trading with *Lewer*, and to contract fresh debts with him, concealing his own prior charge on the fund. He cannot, therefore, be allowed to avail himself of his charge as against them: *Troughton* v. *Gitley* (1); *Ex parte Ford* (2).

[BAGGALLAY, J.A.:—There is something more than standing by; there is a distinct promise by *Wilkes* to pay.

JESSEL, M.R:—It may be that there was no duty on his part to give you notice of his charge, unless you asked him the question. But here he has undertaken to pay the balance to you.]

They were stopped by the Court.

De Gex, Q.C., and *Finlay Knight*, for *Wilkes*:—

The true construction of the order of the 18th of September and of the acceptance by *Wilkes* is, that there was an assignment to *Garrard & Bartram* only of the balance remaining of *Lewer's* share of the moneys after satisfying the claim of *Wilkes*. The evidence proves that this was the intention of the parties, and that the Appellants were informed by *Lewer* of *Wilkes'* prior charge.

[JESSEL, M.R.:—The whole question is, what is the meaning of the word "balance"? If a trustee holds personal estate on trust for sale, and to pay a share of the proceeds of sale to *A.*, and he makes advances to *A.* before he realizes the estate, he is surely entitled, when he has realized it, to deduct those advances from *A.'s* share of the proceeds before making any payment to an assignee of *A.*]

Beresford, for the trustee.

Roxburgh, in reply.

(1) Amb. 630. (2) 1 Ch. D. 521.

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Judgment, Jessel, M.R.

JESSEL, M.R.:—

I think that the decision of the Chief Judge is right. The simple question is, what do the written documents mean? and when we see what the facts were their meaning is perfectly plain. *Wilkes* and *Arliss* were appointed joint receivers in the partnership suit, and they were bound to pay over to *Lewer* his share of the moneys received by them. *Wilkes* advanced to *Lewer* £697 on account of what was coming to him from the receivership account, and obtained from him an authority to the receivers to pay over his share to himself. It did not in form amount to a charge on the moneys, but, having been given for value, it was irrevocable. As between *Wilkes* and *Lewer*, all that was due to *Lewer* was the balance after deducting the £697. Then *Lewer* goes to *Wilkes* and tells him that the amount coming to him will be about £1200, and says that he wishes to charge the balance, after satisfying *Wilkes'* own claim, with the payment of the debt which he owed to *Garrard & Bartram*. Then the two documents of the 18th of September were signed. The first speaks of the "balance of money due to me for goods supplied." It is clear that that means the balance of the £1200 after payment of the £697 to *Wilkes*, which would be about £500 or £600. And the acceptance by *Wilkes* speaks of "the balance collected by me and due to you for goods supplied;" and he adds, "I estimate the balance at about £500." It is plain that *Wilkes*, when he gave that acceptance, understood that he was to pay over to *Garrard & Bartram* the balance remaining after deducting what was due to himself. *Garrard & Bartram* did not take any steps to ascertain what the real amount of that balance was, but they took the security for what it was worth, as they took it in respect of a debt which was already due to them. *Wilkes* undertook to pay over to them this balance, and he is ready to do so now. I can see no pretence for making him pay anything more.

James, L.J.

JAMES, L.J.:—

I am of the same opinion. *Lewer* assigned to the Appellants the balance coming to him from *Wilkes*, and *Wilkes* undertook to pay to them that ultimate balance. There is only a charge upon the

balance really due to *Lewer* after allowing for the advances which have been already made to him by *Wilkes*. There is no ground for disturbing the decision of the Chief Judge.

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BAGGALLAY, J.A.:—

I was at first under the impression that this acceptance had been signed by *Wilkes* with the view of inducing *Garrard & Bartram* to give further credit to *Lewer*. The evidence, however, and in particular the affidavit of *Wilkes*, upon which he has not been cross-examined, shews that the case is very different.

JAMES, L.J.:—

It is a very material fact that the statement of *Wilkes* that *Lewer* told him that he had informed *Garrard & Bartram* of *Wilkes'* prior charge, is uncontradicted. The appeal must be dismissed with costs.

Solicitor for Appellants: *J. Pettengill.*

Solicitors for *Wilkes: Vizard, Crowder, & Co.*, agents for *W. Adams, Plymouth.*

Solicitors for Trustee: *Walters & Gush*, agents for *J. P. Pearse, Plymouth.*

Ex parte LOPEZ. *In re* LOPEZ.

C. A. 1877 *March* 1.

Composition—Trustee to receive and distribute—Alleged Default by Debtor—Action by Creditor for Original Debt—Injunction—Discretion of Court—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 126.

When an action is brought by one of the creditors of a compounding debtor against the debtor for his original debt, the Court of Bankruptcy ought to restrain the action if it can see clearly that it is vexatious and without foundation, even though the question in dispute concerns only the debtor and the creditor who is suing.

But, if there is a substantial question to be tried, the action ought to be allowed to proceed.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Spring Rice*, sitting as Chief Judge in Bankruptcy.

On the 25th of April, 1876, *Eugenio Lopez* filed a liquidation

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petition. At the first meeting of the creditors, on the 22nd of May, it was resolved that a composition of 5*s.* in the pound should be accepted in satisfaction of the debts, the composition to be payable as follows: 1*s.* in the pound within one month from the date of the registration of the resolutions; 1*s.* 6*d.* in the pound at six months date from the date of such first payment; 1*s.* 6*d.* in the pound at twelve months date from the date of such first payment; and 1*s.* in the pound at eighteen months date from such first payment; that the composition should be secured by the promissory notes of the debtor in favour of the creditors, maturing on the above dates; that the composition should be further secured by an assignment by the debtor to the trustee thereinafter appointed of all the outstanding estate belonging to him, with the exception of all pending contracts in connection with his business; and that *H. E. Broad* should be appointed trustee in the matter, to receive and distribute the composition with the approval of and under the supervision of five persons, who were appointed a committee for that purpose. The resolutions were confirmed at the second meeting on the 2nd of June, and were registered on the 28th of June. *Meunier & Co.* were creditors for £205, their name was inserted in the debtor's statement, and they had due notice of the proceedings. On the 19th of August *Broad* sent to them, in *Paris*, a cheque for £10 5*s.*, the amount of the first instalment of the composition on their debt, and three promissory notes of the debtor for the three other instalments, payable respectively six, twelve, and eighteen months after their date. The notes all bore date the 28th of July, 1876. *Meunier & Co.* refused to receive the composition, on the ground that notes ought to have been given for all the instalments on the 28th of June, and that the first instalment ought to have been paid on the 28th of July, and on the 25th of August they returned the cheque and the notes to the debtor's solicitor. On the 4th of September *Meunier & Co.* commenced an action in the Exchequer Division of the High Court against *Lopez* for the full amount of their original debt. *Lopez* applied to the Court of Bankruptcy for an injunction to restrain the proceedings in the action. An interim injunction was granted on the 7th of November, and was continued again on the 18th of November, but on the 2nd of

December the Registrar discharged the injunction. From this order *Lopez* appealed.

Statement.

Broad deposed that since the registration of the resolutions he had always been able and willing to pay the first instalment of composition to *Meunier & Co.*, and also to hand to them on application the promissory notes in respect of the remaining instalments, but that he had never been applied to by them either for payment of the cash composition or for the promissory notes. *Lopez* deposed that *Broad* had always had, and still had, moneys in hand to pay the first instalment in cash in accordance with the arrangement, and that he had duly handed to *Broad* such promissory notes as were necessary to carry out the provisions of the resolutions, and in particular promissory notes in respect of the debt of *Meunier & Co.*

The other creditors had accepted the promissory notes tendered to them, which also bore date the 28th of July.

Argument.

De Gex, Q.C., and *Bagley*, for the Appellant:—

The trustee being appointed by the creditors, the debtor is not responsible for any default committed by him, and they are not entitled to sue the debtor: *Ex parte Waterer* (1). The evidence, however, shews that neither the trustee nor the debtor has committed any default.

Winslow, Q.C., and *Finlay Knight*, for *Meunier & Co.*:—

The rule which has been laid down is, that when the question in dispute concerns only the debtor and the particular creditor who is suing, the Court of Bankruptcy will not restrain the action: *Ex parte Paper Staining Company* (2); *Ex parte Watson* (3). Payment of the composition to the trustee can be pleaded by way of defence to the action: *Campbell* v. *Im Thurn* (4). The whole question can be as well tried in this action. In *Ex parte Waterer* the debtor was not in default. That is the only reported case in which an injunction was granted.

[JAMES, L.J.:—We granted an injunction in *Ex parte Baum* (5).]

(1) 22 W. R. 426.
(2) Law Rep. 8 Ch. 595.
(3) 2 Ch. D. 63.
(4) 1 C. P. D. 267.
(5) Law Rep. 9 Ch. 673.

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Argument.

In the present case the debtor has made default; he has not strictly performed his agreement. He ought to have provided the creditor, immediately after the registration of the resolutions, with promissory notes for all the instalments, which he could at once negotiate. The *onus* is on the debtor to shew that he has strictly performed his agreement. The promissory notes ought to have been dated the 28th of June. The note for the first instalment was never given at all.

De Gex, in reply :—

It was the duty of the creditors to apply to the trustee for payment: *Ex parte Waterer* (1). Extreme strictness is not required on the part of the debtor or the trustee: *Edwards* v. *Coombe* (2); *Ex parte Hemingway* (3). There has been in substance a compliance with the terms of the resolutions, which say nothing about the dates when the promissory notes are to be delivered to the creditors. *Meunier & Co.* had made no application to the trustee before the cheque and the notes were sent to them.

Judgment, Jessel, M.R.

JESSEL, M.R.:—

The application is for an injunction to restrain an action at law brought by one of the creditors of a compounding debtor. The creditor alleges that the terms of the composition have not been complied with by the debtor, so that his original debt remains unaffected. That, of course, is a proper subject for an action at law, but at the same time there is jurisdiction in the Court of Bankruptcy to restrain such an action, the debt being a provable one, if the Court thinks fit. But it is a discretionary jurisdiction to be exercised with regard to the nature of the action and all the other circumstances of the case. Now I think it would be quite proper to exercise that jurisdiction if the creditor were bringing what was obviously and clearly a vexatious and unfounded action. It must be the duty of the Court of Bankruptcy to prevent a compounding debtor from being harassed in that way. Therefore, if the Court came to that conclusion, I think an

(1) 22 W. R. 426. (2) Law Rep. 7 C. P. 519.
(3) Law Rep. 7 Ch. 724, n.

injunction ought to be granted, more especially as the trustee is a trustee not only for the debtor, but for all the creditors, and is appointed by them.

In this case, however, it appears that there is a substantial question to be tried, whether or not the terms of the composition have been really complied with. I can see no reason whatever for transferring the decision of that question from the High Court, in which the creditor has brought his action, to the Court of Bankruptcy. It appears to me that it is a question by no means free from difficulty, and one very fit to be submitted to a Court of the highest jurisdiction, and we ought not in such a case to interfere with the right of the creditor to prosecute his action. Therefore, without expressing any further opinion upon the matter, I think that the Registrar has come to a right conclusion in refusing to restrain the action by injunction.

Judgment. Jessel, M.R.

JAMES, L.J. :—

James, L.J.

I am of the same opinion. It is not necessary to express any judicial opinion as to whether the objection will or will not ultimately prevail, but the question is one which the creditor has a fair right to have submitted to a Court of Law and determined in due course of law. That being so, I think it would not be right for the Court of Bankruptcy to restrain the action.

BAGGALLAY, J.A. :—

Baggallay, J.A.

I am of the same opinion, and for the same reasons.

Solicitor for Debtor: *H. Montagu.*
Solicitors for Creditors: *H. S. Harris & Godwin.*

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1877
March 6.

In re AUSTRALIAN DIRECT STEAM NAVIGATION COMPANY.

MILLER'S CASE.

Company—Winding-up—Contributory—Original Director—Paid-up Shares—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

7 Ch. D. 135.
12 Ch. D. 196
200-3

A limited company was registered on the 6th of November, 1874, with articles of association which provided, among other things, that the share qualification of a director should be the holding of twenty-five shares in the company; that *M.* and others should be the first directors of the company; and that every director should vacate office by ceasing to be the registered holder of his qualifying number of shares. It was also provided that, in consideration of the services of the first directors, each of them should receive and be registered as the holder of twenty-five fully paid-up shares, which were to be forfeited in the event of his dying or ceasing to be a director by his own act or default.

M. attended a meeting of the directors on the 10th of November, but resigned office on the 12th. He never applied for any shares, but he was placed on the register as the holder of twenty-five shares:—

Held (affirming the decision of the Master of the Rolls), that the shares for which *M.* was placed on the register were fully paid-up shares, and that as he had retired from the directorship the shares were forfeited, and his name ought to be removed from the list of contributories.

Statement.

THIS was an appeal from a decision of the Master of the Rolls (1).

The *Australian Direct Steam Navigation Company, Limited*, was registered on the 6th of November, 1874. Captain *Miller* signed the memorandum of association for one share, as to which his liability was not disputed.

The articles of association contained, among others, the following clauses:—

"25. The share qualification of a director shall consist in his being the registered holder of twenty-five shares or stock to the amount of £500 in the company. Admiral *F. B. Crauford*, *T. Backhouse*, Commander *J. P. Cheyne*, *W. B. Dick*, Captain *D. Miller*, Captain *J. Robertson*, and *H. G. Trend*, shall be the first and present directors of the company."

"32. Every director shall vacate his office on ceasing to be the

(1) 3 Ch. D. 661.

registered holder of his qualifying number of shares, or becoming bankrupt, or suspending payment, or compounding with his creditors, or being found lunatic, or (if the board shall so resolve) ceasing for six successive months to attend the meetings of the board."

"38. In consideration of the services of the directors nominated by article 25, each of such directors shall receive and be the registered holder of twenty-five fully paid-up shares of the company, but certificates of such shares shall not be issued, and the directors shall not be entitled to any further remuneration (except as hereinafter provided by article 40) until the shareholders have been paid a dividend of not less than 10 per cent. per annum free of income tax, or until the expiration of three years from the incorporation of the company, whichever shall first happen: after which such further annual remuneration for each year shall (if any) be such sum as shall from time to time be determined by general meetings, and shall be divided as the board shall determine. In the event of any director dying or ceasing to be a director by reason or in consequence of his own act or default prior to the company having declared such dividend, or the expiration of three years as aforesaid, he shall forfeit the above-mentioned twenty-five shares, which shall afterwards be held at the disposal of the board, who shall determine the amount of remuneration to be paid to such retiring director in lieu of such shares, according to the time he has served, and the amount so determined shall be final and conclusive. No share for which any director may subscribe the memorandum of association shall be deemed to be part of the twenty-five shares mentioned in this article."

On the 10th of November, 1874, Captain *Miller* attended a meeting of directors. On the 12th of November he sent to the company a letter resigning his office of director on the ground that he would be unable to attend to the affairs of the company, and on the 16th of November he received a letter from the secretary accepting his resignation.

The company was ordered to be wound up in 1875. At that time Captain *Miller's* name was entered on the register as the holder of twenty-six shares; but he never applied for any shares, nor were any shares ever allotted to him.

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MILLER'S CASE.

Under these circumstances the Master of the Rolls ordered his name to be removed from the list of contributories, except for one share.

From this decision the official liquidator appealed.

Argument.

Everitt, Clement Lloyd, and *Ford,* for the Appellant:—

There is no connection between the 25th and 38th clauses of the articles of association. The directors were bound to take and pay for twenty-five shares as a qualification, independently of the bonus which was given them by the 38th clause. If the twenty-five paid-up shares were the only qualification of the directors, it was a fraud upon the other shareholders and on the public: *Pearson's Case* (1). If there is any ambiguity in the articles they must be construed against the directors.

Chitty, Q.C., *Rodwell,* and *Somers Lewis,* for Captain *Miller,* were not called on.

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion that the decision of the Master of the Rolls is quite right. It is a mere question of construction of the articles. The public, who looked at the articles to see who the original directors were and what the qualification of the directors was to be, saw also that in the case of the first directors that qualification was to be given them by the company. They were to have twenty-five paid-up shares which were to be kept *in medio* for three years. Captain *Miller* was an original director, and had twenty-five paid-up shares registered in his name. He was minded to retire and to give up his shares. He has done so, and he is no longer liable for the shares. The appeal must be dismissed with costs.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *R. H. Wilkins; Lowless, Nelson, & Co.*

(1) 4 Ch. D. 222.

NEW SOMBRERO PHOSPHATE COMPANY *v.* ERLANGER.

C. A.
1876
V.-C. M.
March 27, 28, 29; *April* 3, 4, 5, 10, 11; *June* 2.
C. A.
1877
Feb. 21, 23, 24, 26.

[1872 N. 62.]

Syndicate—Promoter—Purchase by Company—Antecedent Contract—Agency—Fraud—Misrepresentation in Prospectus—Quorum of Directors.

A lease of an island in the *West Indies* containing extensive deposits of phosphate of lime was, on the 30th of August, 1871, contracted to be sold subject to the sanction of the Court, to a person who was in fact the agent or trustee for a syndicate or group of speculators, and the contract was confirmed by the Judge in Chambers on the 15th of September. This agent, on the 20th of September, agreed to sell the property to a trustee for the Plaintiff company, registered the same day, for double the price at which he had purchased, and which had been paid. The main object of the new company, as stated by the memorandum of association, was to acquire the lease of the island and work the phosphates. There were five directors, who were named in the articles of association. Of these, two were away from *England* when the company was formed, and took no part in the management till after the purchase was completed; another was the trustee who purchased on behalf of the syndicate; and another, by arrangement made before the registration of the company, obtained his share qualification by gift or loan from the principal member of the syndicate, who in fact directly or indirectly selected all the directors. The fifth was independent of the syndicate. The three last-mentioned directors, at a board meeting on the 29th of September, adopted the contract for purchase:—

Held, by *Malins*, V.C., (1) that the syndicate must be considered to have purchased the property as from the 30th of August, and, therefore, that from that date they were at liberty to dispose of it as they thought proper; and that, inasmuch as there was no one who, as representing the future company, could then treat the syndicate as being in a fiduciary relation towards him, the company were not entitled to set aside the contract because there was no disclosure of the price at which the syndicate had purchased, or to say that the syndicate were trustees for the company of the difference between the two purchase-moneys: (2) that the fact that the principal or active member of the syndicate had, as early as the 12th of September, commenced negotiations with some of the persons who afterwards became directors with a view to the formation of the company, did not make the syndicate promoters or agents of the company: (3) that though the acceptance of the contract for purchasing the lease of the island was the principal object for which the company was formed, it did not require more than the quorum to make it

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valid: (4) that when the company had entered into possession of the property in pursuance of a contract made on behalf of the company by three of the directors named in the articles of association, it was not open to the company afterwards to object as against the vendors to the validity of the contract, on the ground that the three directors did not legally form a quorum of the body, or that one of the three was, as trustee for the syndicate, vendor, and, as director of the company, purchaser: (5) that the company was not entitled to set aside the contract on the ground that the prospectus, as framed by the syndicate, contained misstatements of the following nature, viz., that an erroneous inference had been drawn from the liquidator's statement as to results of the working of the phosphate on the island which gave a more favourable appearance than the facts justified: That an estimate of the amount of phosphate on the island, deduced from a survey, was referred to in a manner which made it appear as if the survey had been made for the purposes of the company, when it was in fact made several years before, since which time the phosphate had been extensively worked, it not being shewn that there was not still on the island the amount of workable phosphate mentioned in the survey: That it was stated that the directors had entered into a provisional contract for the purchase of a lease of the island, though all that had been done was that three out of the five members of the board had passed a resolution adopting, without investigation, a contract prepared before the formation of the company, and made between one of the three directors, the trustee for the vendors, and a nominee of the vendors, who acted as trustee for the future company.

Held, on appeal, that the syndicate, being the promoters of the company, stood in a fiduciary relation to it, and were bound to make a full and fair disclosure of their interest in the property; and that as they had suppressed the facts that they were the real vendors, and that they gave for the property only half what the company were going to give, and had obtained the acceptance of the contract from such a board as they created, and had inserted in the prospectus statements which would lead intending shareholders to believe that the contract had been approved by all five directors, there was no contract binding on the company, and the sale to the company must be set aside, and judgment given against the members of the syndicate for repayment of the purchase-money:

Held, also, that the estate of a deceased member of the syndicate was liable on the ground that he was a partner, and that the action therefore did not die with him.

Semble, also, that directors not being members of the syndicate were not liable.

Court of Appeal affd. 3 Ch. D. 774; 3 App. Cas. 1218.

Statement.

IN June, 1870, an order was made for winding up an unsuccessful company called the *Sombrero Phosphate Company, Limited*, and Mr. *Chatteris* was appointed official liquidator. That company

was entitled to a lease for the residue of a term of twenty-one years, from the 16th of March, 1865, of the island of *Sombrero* in the *West Indies*, a small barren island containing large deposits of phosphate of lime. A reserved bidding for this lease was fixed at £55,000.

The lease was offered for sale by public tender on the 17th of July, 1871, but the only bid being for £20,000, no sale was effected. Shortly afterwards the Defendant, Baron *Emile Erlanger*, who was a banker carrying on business at *Paris* and *London*, and several other persons, agreed to form a syndicate to purchase the property, if it could be obtained on what they thought reasonable terms. Ultimately it was arranged between *Chatteris* and a Mr. *Westall*, a solicitor who had taken part in introducing the concern to *Erlanger*, and now acted on behalf of the syndicate, that the syndicate should purchase for £55,000, which was the reserved price, and give £5000 more for certain stores. *Westall* bargained that he was to receive £500 for his services in effecting the purchase, and this sum was afterwards paid him by the syndicate. The syndicate arranged to apportion the £60,000 purchase-money among themselves as follows:—

Julius Beer	£7500
Louis Ferdinand Floersheim . .	3500
Colonel *Napier Sturt*	360
Maurice Joseph Posno	900
William Morris and *Frederick Vilmet* .	1800
Alexander M'Ewen	5500
Raphael & Sons	2000
Lionel Lawson	3500
Thomas Westall (for Sir *James Anderson* and his other friends) . . .	16,600
Emile Erlanger & Co. . . .	18,340
	£60,000

Chatteris accepted the offer subject to the approval of the Judge, and a provisional contract, dated the 30th of August, 1871, subject to the approval of the Court, was entered into between *Chatteris* and *John Marsh Evans*, a paid agent of *Erlanger*, as the agent of the syndicate, which contained, amongst other provisions,

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one for paying a deposit of £5500 at the time of signing it. This deposit was paid by means of a cheque of *Emile Erlanger & Co.* The agreement was not signed by *Evans* till the 11th of September.

On the 15th of September this provisional agreement was approved by the Judge in Chambers.

About the same time the syndicate determined to get up a joint stock company, to be called *The New Sombrero Phosphate Company*, for working the island. A memorandum and articles of association were accordingly prepared under the direction of the syndicate, Mr. *Westall* acting as their solicitor. *Erlanger* appeared to have been the principal agent in carrying out the whole of the transactions on behalf of the syndicate, the other members leaving him to manage them as he thought best. Some correspondence took place before the confirmation of the contract, from which it appeared that *Erlanger* had determined upon the formation of a joint stock company.

On the 20th of September, 1871, an agreement was signed by *John Marsh Evans* and by *Francis Pavy* on behalf of the intended company, which recited the agreement of the 30th of August, but without mentioning the price; and it was agreed that *Evans* should sell, and that *Pavy* should buy on behalf of the company, the lease and stores for £110,000, of which £80,000 was to be paid in cash and £30,000 in fully paid-up shares. The contract was expressed to be conditional on the company being registered before the time fixed for completion, and on the contract being duly confirmed by the company. The time for completion was the 15th of November, 1871.

The company was registered on the 20th or 21st of September, 1871, and the memorandum of association, dated the 20th of September, 1871, stated the objects for which the company was established to be, amongst other things, "The purchasing or leasing and working of mines or quarries of phosphate of lime and other minerals or products of a like or similar nature in the island of *Sombrero* in the *West Indies*. The rendering marketable manufacturing, transportation, and sale of phosphate of lime and other minerals or products of whatever kind obtained by such working. The acquiring, making, providing, maintaining, and using of build-

ings, roads, railways, tramways, canals, stock, plant, and other works and conveniences for the purposes aforesaid, and otherwise in connection with the property, operations, or business of the company."

It also stated that the nominal capital of the company was £130,000 divided into 13,000 shares of £10 each.

The articles of association contained the following provisions:—

"19. The company may forthwith issue the 13,000 shares of £10 each, into which its nominal capital of £130,000 is divided, and may from time to time, with the sanction of a special resolution, increase the capital beyond the sum of £130,000 by the creation of new shares."

"65. The number of directors shall from time to time be determined by the company in general meeting. Until any other number is so determined, there shall not be less than four directors nor more than seven. The first directors shall be His Excellency Monsieur *Drouyn de Lhuys*, *E. B. Eastwick*, Esq., the Right Hon. *Thomas Dakin*, *John Marsh Evans*, Esq., and Rear-Admiral *R. John Macdonald*."

"74. Every director shall vacate his office upon ceasing to hold in his own right the prescribed number of shares, or becoming bankrupt or suspending payment, or making any statutory arrangement or compounding with his creditors, or being found lunatic or holding any office or place of profit in the company, or being concerned or participating in the profits of any contract with the company, but no director shall vacate his office by reason of his being employed by the company or the board in any professional capacity, or as a manager of the business, or any part thereof, or of his being a director, or member, or shareholder, or otherwise interested in any company or partnership which has entered into contracts with, or done any work for, the company; nevertheless he shall not vote in respect of such contract or work, and if he does so vote, his vote shall not be counted."

"82. In their management of the business of the company the directors may, without any further power or authority from the members, do the following things, viz. (amongst other things):—

"They may adopt and carry into effect the contract for the assignment to the company, bearing even date herewith, of the island of

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Sombrero, in the *West Indies*, and the factory, buildings, and works thereon, for the residue of a term of twenty-one years from the 16th day of March, 1865, subject to the provisions contained in the lease thereof."

It was also provided that the quorum of the directors for the management of the business of the company should be three, and that the qualification of a director should be the holding fifty shares in his own right.

On the 20th or 21st of September the balance of the £55,000 payable to *Chatteris* for the purchase of the lease and stores was paid.

Of the five directors named in the articles of association, M. *Drouyn de Lhuys* was resident in *France*, Mr. *Eastwick* was absent in *Canada*, Sir *Thomas Dakin* was the Lord Mayor of *London*, *Evans* was the agent of *Erlanger* and the party named as vendor in the agreement of the 20th of September. The precise nature of his connection with *Erlanger* did not appear further than that he was employed by him, and was to be paid for his services, and afterwards received as compensation from *Erlanger* 100 fully paid-up shares in the company. *Macdonald*, the fifth director, never took any steps to provide the money for the shares constituting his qualification, and it appeared that he never intended to do so. On the 28th of September he wrote to *Erlanger*, requesting that "for appearance' sake" he would allow some of *Erlanger's* shares to go into his name, to which *Erlanger* replied on the 1st of October:—"It is quite understood that we lend you the fifty shares necessary for your qualification. *Ludwig* knows about this, and you can speak to him." This arrangement was carried out by an advance being made to *Macdonald* by *Erlanger & Co.* through *Floersheim*.

The first meeting of the board of directors took place on the 29th of September, 1871. There were present Sir *Thomas Dakin* (in the chair), *Macdonald*, and *Evans*. The minutes of this meeting shewed that *Westall* produced the certificate of incorporation of the company, the contract of the 30th of August, and the agreement between *Evans* and *Pavy* dated the 20th of September, 1871.

It did not appear that the propriety of this agreement was in

any way considered, or that it was compared with the contract of the 30th of August; but a simple resolution was passed, apparently without debate, approving of it. *Macdonald* and *Dakin*, in fact, stated that the contract of the 30th of August was not produced at all at the meeting.

At the same meeting Mr. *Westall* was appointed solicitor to the company, and a resolution was passed for issuing a prospectus. This prospectus, after describing the company as the *New Sombrero Phosphate Company, Limited*, and stating the capital to be £130,000, divided into 13,000 shares of £10 each, gave the names of the directors as follows:—"His Excellency *Drouyn de Lhuys*, President of the *Société des Agricultures de France;* The Right Honourable Sir *Thomas Dakin*, Lord Mayor of *London*; *E. B. Eastwick*, Esq., C.B., M.P.; *John Marsh Evans*, Esq., *Leamington;* Rear-Admiral *R. John Macdonald*, 1, *Ovington Square, London.* Bankers: Messrs. *Glyn, Mills, & Co., Lombard Street*, E.C. Solicitors: Messrs. *Westall & Roberts*, 7, *Leadenhall Street*, E.C. Auditors: Messrs. *Price, Holyland, & Waterhouse.*"

It contained the following amongst other statements:—

"This company is formed for the purpose of purchasing the island of *Sombrero*, in the *West Indies*, and working its well-known and important deposit of phosphate of lime. The island is held on lease granted by Her Majesty. The property formerly belonged to the *Sombrero Company*, which is now being wound up under the Court of Chancery. The sole cause of this liquidation was the insufficiency of capital, and the consequent forcing of the produce at unremunerative prices. This is proved by the following statement, which has been certified as correct by the official liquidator, Mr. *H. Chatteris*, under whose able management the island has been worked, and which shews the profit made in the ten months during which the cargoes received have been realized. The subsequent shipments will produce a still higher rate of profit; but as the account sales have not been closed, they are taken from the statement. The particulars of shipments annexed shew that there were raised and shipped by the liquidator in ten months—July, 1870, to May, 1871—thirty-six cargoes of phosphate, producing 16,127 tons 3 cwts. 1 qr. 5 lbs., at prices varying from 85*s.* to 95*s.*

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delivered in *England*, and from 40*s.* to 42*s.* 6*d.* free on board, and which produced net proceeds £38,960 3*s.*

"The cost of realizing this was £11,300 in cash, and in stores £4579 2*s.* 8*d.*—in all	£15,879	2	8
"Leaving in hand a net profit at 28/7½ per ton for ten months	23,081	0	10
Or, per annum.	27,697	5	0
"The present price, and which has been obtained by the liquidation, is, however, £5 per ton, which would have produced in addition on the above returns . . .	14,502	14	3
"Equal to an annual clear profit (subject to £1000 per annum for rent) of . .	£42,199	19	3

"In the above result, the basis of the present ratio of production under liquidation in Chancery is taken, but with a sufficient capital, and the prudent management of experienced commercial men, this produce may be easily increased by 5000 tons per annum, which would yield an annual profit of £50,000, after payment of rent and expenses of management. The results and figures of the ten months' liquidation have been carefully checked, and may be absolutely relied upon. A report, made after careful survey, estimates the deposit at 700,000 tons at the least, and for ten years there has been a steady and continuous supply proportionate to the labour and capital employed."

The survey here referred to had, in fact, been made in 1864, and the report in 1865.

Then, after certain other statements, came the following clause:—

"The directors have entered into a provisional contract to purchase the property, including the lease of the island, as from 29th September, 1871, together with all buildings, plant, fixed or rolling stock, machinery, steam engines, lighters, &c., now at the island, complete and in full working order, for the sum of £110,000. Copy of this contract, which is dated 20th of September, 1871, and made between *John Marsh Evans* of the one

part, and *Francis Pavy*, on behalf of the company, of the other part, may be seen at the office of the company's solicitors."

Evans, though described as of *Leamington*, was a mere visitor there, his real residence being at *Paris*.

The applications for shares were so numerous that at a board meeting of the 6th of October, 1871, 10,325 shares were allotted to the public, leaving only 2675 to answer the 3000 fully paid-up shares to be allotted to the syndicate.

At a board meeting on the 2nd of November, 1871, at which were present Sir *T. Dakin*, *Macdonald*, and *Evans*, *Westall* attending as solicitor, a resolution was passed to the effect that, the transfer of the island and property having been completed, a cheque for £80,000 should be forthwith drawn. The cheque for that sum was accordingly drawn and passed to *Erlanger's* firm, who distributed the money among the syndicate according to their interests.

The first ordinary general meeting of the company took place on the 2nd of February, 1872. From shorthand notes of the proceedings it appeared that after the chairman, Sir *T. Dakin*, had made some preliminary observations, a shareholder, Mr. *Stephenson*, spoke to the following effect:—

"I am sure I am very much pleased with the statement you have submitted to the shareholders, but there are a good many rumours that are antagonistic to the company out of doors. I came to the meeting with a feeling of dissatisfaction, which your statement has allayed. I mention these rumours that you should have an opportunity of contradicting them. It is stated this company was not bought direct from the liquidator, but from a third party, an intermediate party between this company and the liquidator, bought one day at a little over £50,000, and within a few days afterwards sold to this company at £110,000. Now, if the directors entering into this matter were satisfied the thing was a good bargain at £110,000, I do not know that we have much to do with the matter except this: It is stated that one of our present directors was the buyer and the seller in this matter; and I think that is very material to us. I mention that, in order that I may ascertain whether one of our directors on this board was really the

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man who bought the company one day at £50,000, and within a short time afterwards was both buyer and seller at £110,000. I think if that was the case we ought not to sanction the continuance of the director on the board. I do not know the name."

The Chairman: "You allude to the gentleman named in the prospectus, Mr. *John Marsh Evans*."

The Shareholder: "I think it was an improper transaction that one of the directors should be both the buyer and the seller of the property. That requires a little explanation on the part of the board."

The chairman then made some remarks, in the course of which he stated that he had heard some rumours as the shareholder had, that he had made some inquiries, and he was told Mr. *Evans* bought this with other gentlemen fully a month before the company was thought of or projected, and he further stated as follows: "It appears to me the contracts between Mr. *John Marsh Evans* and Mr. *Pavy*, on behalf of the company, were stated in full in the prospectus, and all those persons who joined the company were invited to look at them. Whether it cost £50,000 or £100,000, I do not think is material to the question. It was not bought by one of our members. The gentleman was not a director then, but bought in concert with other people. What it was bought for I do not know."

The Shareholder: "Out of doors they say £55,000 was the sum paid for it."

Some more discussion took place, and the business was concluded with a vote of thanks to the chairman.

The annual general meeting of the company took place on the 19th of June, 1872, *J. M. Evans* in the chair, and the affairs of the company being in a very depressed state, resolutions were carried for the appointment of a committee of investigation, and the adjournment of the meeting to a period within six weeks. The adjourned meeting took place on the 29th of August, 1872, the committee of investigation having in the meantime presented a report, in which they recommended the removal of the directors and the appointment of fresh ones, and that the new board be authorized to take such proceedings in the name of the company as they might be advised, for the purpose of recovering back the difference between the two purchase-moneys.

The board was accordingly reconstituted, and the new directors were authorized to commence the proceedings which resulted in the institution of the present suit.

As a preliminary measure letters were sent in September, 1872, in the name of the new chairman, to each of the members of the syndicate, requesting them to consider the matter, and inviting them to make some proposal for approval by the shareholders. In reply to one of these letters Baron *Erlanger* wrote repudiating all legal liability, but offering to give the company the benefit of the full amount of profit which his firm personally derived in cash and shares from the transaction. The other members of the syndicate however did not respond to the chairman's invitation.

The original bill was accordingly filed on the 24th of December, 1872 against *Erlanger*, *Evans*, Mrs. *Westall* (the widow of *James Westall*, who had died pending these transactions), *Dakin*, and *Macdonald*. *Erlanger*, by his answer to the original bill, submitted that the other members of the syndicate should be made parties to the suit. They were accordingly added by amendment, and by re-amendment one or two other persons who represented interests in the syndicate were also made parties.

The bill asked to have the contract of the 20th of September, 1871, set aside and delivered up to be cancelled, and for an order against such of the Defendants as were members of the syndicate to repay to the company the £110,000 with interest at £5 per cent. per annum, the company offering to deliver up the island and account for the profits made by working it; and it asked in the alternative that the members of the syndicate might be ordered to repay £55,000, the difference between the price paid by the syndicate and that paid by the company. It also sought to make some of the Defendants answerable for the profits made by them by dealing with the shares of the company on the *Stock Exchange*.

Dakin, by his answer, stated that the contract of the 30th of August was not produced at the board meeting on the 29th of September, and that he had never seen the contract, and only knew of its purport some time afterwards, and then only by report;

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that he considered the contract then approved of and confirmed to be that of the 20th of September. He also stated that he had acted under the belief that the statements in the prospectus as to the working of the island were true; but he admitted that he had approved of the contract without making any independent inquiry on behalf of the company as to the value or productiveness of the island, and he stated that what he had said at the meeting of the 2nd of February was all he then knew about the purchase, and he did not then know at what price the property had been originally purchased.

The suit was heard before Vice-Chancellor *Malins* on the 27th, 28th, and 29th of March, and on the 3rd, 4th, 5th, 10th, and 11th of April, 1876.

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Higgins, Q.C., *Davey*, Q.C., and *Alexander Young*, for the Plaintiff company:—

The defences raised by the several Defendants throw the responsibility of the entire transaction upon *Erlanger;* and if it is once established that *Erlanger* was a promoter of the company, he and the other members of the syndicate were in a fiduciary position towards the company; and unless there was the utmost open dealing and the fullest disclosure between *Erlanger* and the company, the latter are entitled to set aside the purchase altogether.

Now it is clear that there never was any independent investigation as to the propriety of the purchase on the part of the company. The vendors were the syndicate who formed the company, had entire control over it, appointed the directors, and prepared the memorandum and articles of association.

The syndicate, or at least *Erlanger*, knew that on the 29th of September there was not a board competent to enter into a contract with them. *Drouyn de Lhuys* and *Eastwick* were both away. *Evans* was indirectly related to and the confederate of *Erlanger*, and was the nominal vendor. Admiral *Macdonald* was, as he admits, qualified by *Erlanger*, and therefore was not able to give an independent consideration to the subject. There remained, therefore, Sir *T. Dakin* as the only independent man who might be expected to protect the interests of the company, and he appears to have taken everything on trust. The resolutions of that

meeting were therefore passed by persons who in equity could not bind the company.

The facts shew conclusively that *Erlanger* was the promoter of the company. It will perhaps be suggested that the law has been changed by *Gover's Case* (1), and that it is necessary to shew that when the first contract was entered into the company was actually in course of formation. But *Gover's Case* only decided that an application by contributories to be relieved from liability on shares could not be granted on the ground that a contract was made with a person who afterwards became a promoter of the company, though some of the *dicta* may lend colour to the argument sought to be founded on that case. Here the company was entirely the creation of *Erlanger*, and the inception of it must be carried back to the time of the purchase by the syndicate. The case must be treated as if *Erlanger* was upon the board. He names the directors. *Evans'* vote was really his, and so was *Macdonald's*. The contract was, therefore, in its essence and spirit, just as if it had been made by *Erlanger*, and in such a case it could not stand, because there was no disclosure to the public of the contract between *Erlanger* and the liquidator: *Aberdeen Railway Company* v. *Blaikie* (2), on which was founded *Imperial Mercantile Credit Association* v. *Coleman* (3). The principle upon which all such cases as these rest is clearly stated by Mr. Justice *Lindley* (4). It was followed in *Phosphate Sewage Company* v. *Hartmont* (before Vice-Chancellor *Malins* on March 1, 1876) and in the *Lindsay Petroleum Company* v. *Hurd* (5). *Fawcett* v. *Whitehouse* (6) shews that persons who act on behalf of others forming a company cannot obtain a profit for themselves out of the transaction. So also *Tyrrell* v. *Bank of London* (7); *Charlton* v. *Hay* (8); *Cornell* v. *Hay* (9); *Beck* v. *Kantorowicz* (10); *Great Luxembourg Railway Company* v. *Magnay* (11); *Hichens* v. *Congreve* (12). Then, again, though by the articles of association a quorum of three only was required to transact the ordinary

(1) Law Rep. 20 Eq. 114; 1 Ch. D. 182.
(2) 1 Macq. 461.
(3) Law Rep. 6 H. L. 189.
(4) Lindley on Partnership, 4th Ed. pp. 595, 597, 599.
(5) Law Rep. 5 P. C. 221.
(6) 1 Russ. & My. 132.
(7) 10 H. L. C. 26, 32.
(8) 23 W. R. 129.
(9) Law Rep. 8 C. P. 328.
(10) 3 K. & J. 230.
(11) 25 Beav. 586.
(12) 1 Russ. & My. 150, n.

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business of the company, that did not apply to an important matter like the acceptance of the contract specially mentioned in the articles of association. That required the sanction of the entire board. But assuming that a quorum was sufficient, there was no quorum, for there was only one *bonâ fide* director at the meeting of the 29th of September. The directors were not all summoned, and there was no legal quorum, even assuming that there was no objection to the three directors who attended as individuals: *Kirk* v. *Bell* (1); and the directors could not delegate their functions to a smaller number in so important a matter: *Howard's Case* (2). Again, there were important misrepresentations in the prospectus. Apart from the fact that the address of *Evans* is untruly given, there are three principal misstatements. First, the result of the workings during the liquidation is incorrectly stated so as to vitiate altogether the statement of profits. Secondly, the report as to the amount of phosphate in the island, which report every one reading the prospectus would imagine to have been made for the purposes of the company, was really made in 1865, since which time the island had been worked continuously for phosphates. Thirdly, it states that the directors had entered into a provisional contract for the purchase of the island for £110,000. Persons reading that statement would have a right to assume that the five directors named at the head of the prospectus had entered into the contract.

Cotton, Q.C., *Fry*, Q.C., and *Ingle Joyce*, for *Erlanger*:—

The Plaintiffs have entirely failed to make out a connection between the purchase by the syndicate and the formation of the company. When the contract of the 30th of August was made *Erlanger* clearly was not in a fiduciary position as regarded the company. No attempt has been made to carry back the inception of the company so far back as the 11th of September when *Evans* signed the contract, and there only remained the formal ministerial act of approval in Chambers to make it complete. As regarded the syndicate, it was binding on the 30th. On the 16th of September *Erlanger & Co.* sent round to each of the persons associated in it a statement calling upon him to pay up his portion of the

(1) 16 Q. B. 290. (2) Law Rep. 1 Ch. 561.

purchase-money, and on the 21st of September the balance of the purchase-money was paid.

It is clear that there was no agency for the company at first, and it has not been made out that *Erlanger* was an agent for the company when the contract was completed. An intention to form a company afterwards does not make a person an agent for constituting the company. The minutes of the meeting must be taken to be conclusive that the agreement of the 20th of September was approved by the company with knowledge of that of the 30th of August.

With regard to the alleged misrepresentations in the prospectus, the prospectus itself gave notice that the vendor was one of the directors. It gave every one the opportunity of looking at the contract of September, 1871, and therefrom learning of the existence of the previous contract; and if people will shut their eyes and go into a company without making inquiries, they cannot afterwards ask relief from the Court. The fact of *Westall* being the solicitor for both parties was disclosed. The burden is upon the company to make out a case of misrepresentation, more especially when they were in possession of the island from October, 1871, and obtained at once information as to the state of things there, and it was not till the 2nd of February, 1872, that the first steps were taken to question any of the transactions; and if the statement as to the result of the working was made *bonâ fide*, as there is no doubt it was, the contract cannot be set aside merely because that statement was inaccurate: *Kennedy* v. *Panama, &c., Royal Mail Company* (1). As to the report of the quantity of phosphate remaining having been made in 1864, it is quite immaterial when it was made, provided that there is the actual quantity of phosphate on the island, and of that there is no doubt. Then the statement that the contract with *Evans* was made by the directors does not imply that every one of the directors took part in it. Even where the number of directors is fixed by Act of Parliament this is unnecessary: *Thames Haven Dock Company* v. *Rose* (2). Then it is said there was no board. But there was, in fact, a valid board meeting according to the articles of association, by which the quorum was fixed at three. Granting that *Evans*

(1) Law Rep. 2 Q. B. 580. (2) 4 Man. & G. 552.

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was disqualified, it was only from voting, not from making a quorum of the board. It is said that *Macdonald* was also incapable of contracting, on account of having received his share qualification through *Erlanger*. But he did not take steps to have his qualification provided till after the first meeting, and it is obvious that no director is ever duly qualified at the first meeting of a company, which must take place before the allotment of shares. There was, therefore, no valid objection to *Macdonald*, and *Dakin* is admitted to have been duly qualified. *Kirk* v. *Bell* (1) was a case of a board not duly constituted.

The main question is, therefore, whether *Erlanger* entered into the original contract as the agent of the company. It is not necessary to contend that there can be no such thing as an agency for a company to be afterwards formed. But the agency here was entirely on behalf of the syndicate, not of the company. Though *Gover's Case* (2) may not be exactly in point, it covers the principle of this case. This case must be distinguished from those in which a contract is made for a particular sum, and there is a sub-contract that out of that the person sought to be charged is to receive something. That is fraud, and the present case is distinguished from those which were cited, because in all those cases there was a representation that the whole fund was to go to the first contracting party; and, in fact, some found its way to some other person. All the cases cited come within that position: *Fawcett* v. *Whitehouse* (3); *Hichens* v. *Congreve* (4); *Beck* v. *Kantorowicz* (5); *Tyrrell* v. *Bank of London* (6). But even if there are misrepresentations in the prospectus, there is nothing to connect *Erlanger* with them.

As regards the right to sell at an enhanced price, that turns on the question of agency; and that is illustrated by the difference between the positions of *Erlanger* and *Pavy*. *Pavy* entered into the contract before the company was formed, but he did so as the agent of the company. *Erlanger*, in what he did, was merely the agent of the syndicate. It is impossible to maintain that

(1) 16 Q. B. 290.
(2) Law Rep. 20 Eq. 114; 1 Ch. D. 182.
(3) 1 Russ. & My. 132.
(4) Ibid. 150, n.
(5) 3 K. & J. 230.
(6) 10 H. L. C. 26.

when *Erlanger's* agent bought the property on the 30th of August he did so as the agent of the company. *Foss* v. *Harbottle* (1) exemplifies the distinction between inviting the public to come in and purchase a property and asking them to come in and share the benefit of a bargain; and *Paul and Beresford's Case* (2) shews that however short the space of time between the sale to the promoters and the sale to the company, if the two transactions are distinct, agency cannot be attributed, because one of the parties to the first scheme became a director of the company when formed.

The fact that the property was of a perishing character, was a reason why the company were bound to avail themselves of the earliest opportunity for opening up these transactions, and they had sufficient information in February, 1872.

Bristowe, Q.C., and *Kekewich*, for *Julius Beer*:—

The only case attempted to be made against *Beer* is that he gave authority to *Erlanger* to act on his behalf in the formation of the company. *Beer* was not in any view directly concerned in the contract, and even if it were set aside his position would not be affected. And on the whole, the cases cited, such as *Tyrrell* v. *Bank of London* (3), are all cases of agents putting money in their own pockets which they ought to have shared with others.

J. Pearson, Q.C., and *Romer*, for several other members of the syndicate:—

There is no justification for bringing these parties before the Court. No case has been proved against them, and if the company were bound to bring them before the Court on *Erlanger's* objection, they were equally bound to prove against them the case on which they intended to rely.

Bristowe, Q.C., and *W. W. Karslake*, for Mrs. *Vilmet*, the executrix of *Vilmet*:—

As an executrix, Mrs. *Vilmet* is not liable to be sued for the wrong-doing of her testator, if he did wrong: *Peek* v. *Gurney* (4).

(1) 2 Hare, 461.
(2) 33 Beav. 204.
(3) 10 H. L. C. 26.
(4) Law Rep. 6 H. L. 377.

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Bristowe, Q.C., and *Kekewich*, for Admiral *Macdonald*:—

The contract is not vitiated by the arrangement for providing the Admiral's qualification, because there was no antecedent arrangement for providing it, and the loan, which, however, is regretted, did not take place till after the agreement was confirmed. On the main question, however, the articles of association expressly provide that the company may carry into effect the agreement made by the syndicate.

Bush, for Sir *T. Dakin*:—

The charges made against Sir *T. Dakin* are of gross personal fraud and neglect, and they are refuted by the facts proved, and especially by that of his continuing to hold a stake in the company.

Benjamin, Q.C., and *Everitt*, for Colonel *Sturt* and Sir *James Anderson*:—

The charge of fraud as regards these Defendants ought to be withdrawn from the bill. They were not parties to the original bill, and if it was necessary to make them parties because *Erlanger* required it, it was not on that account necessary to charge them with fraud which it has not been attempted to prove against them. It is clear that mismanagement, and not an excessive price, was the real cause of the failure of the company. That the intention of the syndicate was *bonâ fide*, is shewn by the fact that the members have retained a large number of the shares.

Whitehorne, for the trustee in bankruptcy of *Alexander McEwen*, and *Macnaghten* and *F. A. Lewin*, for a sub-partner of *McEwen*, contended that they were not necessary parties.

Glasse, Q.C., and *Wintle*, for *Evans*:—

This is a bill containing allegations of fraud of the basest description, of which there is not the smallest trace of positive evidence.

Ford North, for Mrs. *Westall*.

Higgins, in reply.

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MALINS, V.C., after referring to the facts of the case, and reading the passages in *Erlanger's* answer in which he asserted that the syndicate was entirely independent of the company, continued :—

I am of opinion that the claim of the company to have the purchase-money reduced to £55,000, on the ground that Baron *Erlanger* and those associated with him were their agents in making the purchase at that price, cannot be sustained. If they had been such agents, it would have been clear that they could not against their principals have stipulated for any advantage to themselves, and *Fawcett* v. *Whitehouse* (1), *Hichens* v. *Congreve* (2), *Tyrrell* v. *Bank of London* (3), and *Imperial Mercantile Credit Association* v. *Coleman* (4), which were so much relied on by the Plaintiffs' counsel, would have applied against the Defendants. But that the purchase of the property, with the view to the formation of a company, does not make the purchaser a promoter of the company after it is formed, or oblige him to sell the subject of the purchase at the price he gave for it, or upon any other terms than such as he may think proper, has been recently decided by *Gover's Case* (5), which was cited on both sides, and very much relied on, more particularly no doubt, as was natural, by the Defendants. The case came first before Vice-Chancellor *Bacon*, where he puts the case with remarkable clearness, and all that was done in the Court of Appeal was to affirm what he had decided. The fact there was that Miss *Gover* sought to have her name taken off the list of contributories, because she stated there had been no disclosure. The point turned on whether one *Mappin*, who had bought a patent for £65,000, and resold it to the company partly in money and partly in shares for £120,000, was to be considered as the promoter of the company, and bound, therefore, to state in the prospectus and disclose the contract under which he had acquired the property. That was the point to be decided, and the only point to be decided. Now in that case, to shew that *Mappin* should be regarded as a promoter of the company, he did not, as in the present case, pay £65,000 in cash for the purchase of the patent. It was a small

(1) 1 Russ. & My. 132.
(2) Ibid. 150, n.
(3) 10 H. L. C. 26.
(4) Law Rep. 6 H. L. 189.
(5) Law Rep. 20 Eq. 114; 1 Ch. D. 182.

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amount of cash, and the rest to be paid in shares of a company to be formed; therefore there were strong indications that he was in the beginning promoting a company, and the circumstance that he was to be paid in shares was a strong indication that such was the real motive and object. However, Vice-Chancellor *Bacon* did not take that view of the case, nor did the Court of Appeal differ from his decision. The Vice-Chancellor expresses himself thus (1): "He had acquired a commodity," that was the patent, "by contract between himself and *Skoines*," who was the patentee. "It was his to sell or deal with in any way he thought fit. He was bound, if *Skoines* insisted on it, to fulfil all the terms of the agreement. Whether he did or not was an affair between himself and *Skoines*, with which the company had nothing to do. Well, then, was it incumbent on *Mappin*, when he dealt with the company for the sale to them of the patent which he had contracted for with *Skoines*, to tell them the price at which he had agreed to buy it? I can conceive no reason why he was under such obligation. If he had advertised it in the way I have suggested as being possible—not that it has any relation in fact to the circumstances of this case—but if he had advertised that he was ready to sell a patent of which he had become the owner, the purchaser, or persons proposing to become purchasers, would have no right to ask him what he had given for it, and he would be under no obligation to disclose what he had given for it. If the prospectus had contained a statement of the fact, it could have made no difference, because the subsequent contract of purchase by the company from *Mappin* could not have been influenced in any degree by the fact that he had bought at one-half the price for which they had bought it from him. It cannot in reason be suggested that, if stated, it would have made any difference in the opinions of the shareholders, or that the shareholders or intending shareholders could have been in any degree prejudiced, affected, or even influenced by the fact that he had bought at a very cheap rate that which he was selling at a comparatively dear rate. The fact that he was a promoter, which is necessary to establish this case, is not, therefore, in my opinion, established by the evidence before me, and I cannot adopt the inferences drawn from the stipu-

(1) Law Rep. 20 Eq. 122.

lations in the agreement as evidence of that which is unsupported by any other kind of evidence. Upon that ground, therefore, in my opinion, the applicant is not entitled to the relief which she seeks. She would be entitled under the Act of 1862, if she had shewn any equitable ground upon which she was entitled to be discharged from the contract. Leaving out of consideration for the moment the new law which is introduced by the Act of 1867, I cannot find any equitable ground on which she would be entitled to relief. It is not inequitable that a man should buy as cheap and sell as dear as he can. The seller is under no obligation to state the price at which he purchased. The purchasers are the best judges of whether the thing offered for sale is worth the money which is demanded for it, and the shareholders know when they apply for shares, having read the prospectus, that the price which the company are to pay is that which is expressed in the agreement referred to in the prospectus. I say, therefore, laying aside the Act of 1867, no equitable ground has been suggested upon which a shareholder would be entitled to retire from the contract entered into. I am unable to follow the reasoning by which it is said that there is a fiduciary relation between the parties. In the cases referred to"—they were such as *Fawcett* v. *Whitehouse* (1), and that class of case—in which "the fiduciary relation was clearly and plainly established, and the Court proceeded upon it, but what trust or confidence exists in the case of a man who buys a patent for £60,000, and offers to sell it for £120,000?" I say, in the same way, what fiduciary relation is there between a man or a body of men who buy an island for £55,000, and sell it to a company for £110,000?

In the Court of Appeal, consisting of four Judges, that decision was affirmed in substance by three—that is, wholly by two, partly by a third, and dissented from by the fourth, who was Mr. Justice *Brett*, but the law, of course, must be taken from the majority of the Judges of the Court, and I only refer to two passages in the judgment of Lord Justice *James*, in which he completely adopts the rule laid down by Vice-Chancellor *Bacon*. He says (2): "At the time when this agreement was made there was no company in existence, and no promoter, trustee, or director;

(1) 1 Russ. & My. 132. (2) 1 Ch. D. 186.

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the company had not even an inchoate existence except in the brain of *Mappin;* and the utmost that could be said of *Mappin* was that he was a projector of a company which he intended and had agreed to promote. Having acquired this equitable right in or to the patent, this dominion over it, for his own purpose and benefit, having bought what he did buy of *Skoines* for the lowest price he could get the latter to accept, with the view to sell it at the highest price which he could get, he did what it appears to me he lawfully and rightfully might do, he advertised his wares to the public in the following manner. In substance he says, 'I have an article to dispose of; I am willing to allow persons to become partners and shareholders with me on the following terms and conditions.' He had a right to prescribe his own terms and conditions like any other vendor with any other purchaser. The way in which he made his offer was in the usual way, viz., he entered into a provisional contract with a person on behalf of the intended company. The making of that provisional contract was, in my opinion, the first period of time at which it could be said that the company had even an inchoate existence"—here it would be the 20th of September when the contract was made with Baron *Erlanger*—"and it was from and after the making of that contract that any fiduciary or other relation between *Mappin* and the company began. In the making of that contract, in presenting his own terms and conditions, he was, according to my judgment, in the position of any ordinary vendor with any ordinary purchaser. Everything anterior to that was a matter relating to himself and to his own title as vendor." Mr. Baron *Bramwell* took precisely the same view; there was a little variation of opinion by Lord Justice *Mellish*, and that was wholly dissented from by Mr. Justice *Brett*.

In this case the price was paid in money, and it is therefore much stronger than *Gover's Case* (1) in favour of the vendors to the company, because there the price was to be paid, or the greater part of it, in shares of the company to be formed. I am, therefore, of opinion, as well on principle as upon the authority of that case, that Baron *Erlanger* and his associates were the absolute owners of the property, and were at liberty to retain it or to form

(1) Law Rep. 20 Eq. 114; 1 Ch. D. 182.

a company to buy it, and had a right to demand and receive from the company, or from any other purchaser, whatever price they chose to demand for what they had to sell. In the exercise of this right they determined to form a company to work the island, and to charge the company £110,000 for that which they had, within a month, bought for just half the price.

The main and difficult question I have to decide is whether the company was formed and conducted in such a manner as to make the contract a binding one, as the Defendants contend it is, or whether it ought to be rescinded, as the Plaintiffs contend it ought to be. In pursuance of the plan for the formation of the company the contract for the sale of the island to a trustee for the company was entered into. The contract is set out at page 14 of the bill, and begins: "Articles of agreement made this 20th day of September, 1871, between *John Marsh Evans*, of *Leamington*, in the county of *Warwick*, Esquire, of the one part, and *Francis Pavy* of the other part." It then recites the contract between Mr. *Chatteris*, the liquidator, and Mr. *Evans*, the present vendor, of the 30th of August. It does not recite the price that he paid, but it recites that he bought the property, and it goes on to contract that *Evans* would sell and *Pavy* would buy on behalf of the company the lease of the island and certain things specified for £110,000. The contract is very much in the same form as the contract of the 30th of August, and the 17th clause of it stated in the 20th page of the bill is in these words: "This contract is entered into subject to the above-named *New Sombrero Company, Limited*, now in process of formation being duly formed and registered before the day fixed for completion, and to the said recited contract being duly performed." That is the 20th of September. Then there is the memorandum of association, which is dated the same day, and was probably signed and registered before the contract was signed. [His Lordship then referred to the terms of the memorandum of association and the prospectus, and continued:—] Now, considering that *John Marsh Evans* is one of the directors named, and is referred to in the prospectus as one of the directors, anybody reading it must have inferred that he was the vendor, and therefore at the same time vendor and director, because he sells and

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Francis Pavy buys. Anybody looking at the contract would have found that out, for it is as plain as possible.

This prospectus proved very attractive. No doubt it held out the greatest expectations, and was likely at that time to procure subscriptions. Applications were forthwith made by the public for many more shares than the company had to dispose of. I think the present chairman of the company states that he applied for thirty or fifty shares, but that he only got five; and, to shew that he was so much satisfied with the prospect of the company, he afterwards bought more in the market, and made up the number to fifty. The whole of the shares were allotted on the 6th of October following, so that within a fortnight of the issuing of the prospectus the whole capital was actually taken up and allotted, and upon the 2nd of November, £80,000, the part of the purchase-money to be paid in cash, was paid with a cheque for that amount drawn by Sir *Thomas Dakin*, the chairman of the company, and Admiral *Macdonald*, countersigned by the secretary, upon the bankers of the company, which was received by *Erlanger & Co.*, the accredited agents of the syndicate, the vendors to the company.

The company entered into possession of the property on the 21st of October, and for a time it was considered to be going on most satisfactorily. At the first meeting of the company, on the 2nd of February, 1872, presided over by Sir *Thomas Dakin*, it was stated that the operations of the company for the first three months down to the 31st of December shewed a profit of about £6000. The proceedings at that meeting, appearing from the transcript of the shorthand writer's notes, have been referred to. [His Lordship then read the above-mentioned statements as to what took place at the meeting, and continued:—] Everything had then a brilliant prospect. But at the meeting held in the following August it unfortunately turned out that the accounts shewed that the operations of the company up to the 30th of June, 1872, had resulted in a loss of £4090 19*s.* 3*d.* It has been proved that it has continued to lose money ever since, and the total loss up to the 31st of December, 1874, is £7620 15*s.*, and it is confidently stated on the part of the company that there is no

prospect of improvement. There have, of course, been no dividends, and the shares upon which £10 have been paid are stated not to be worth £2 in the market. This is a lamentable and disastrous result for all parties concerned, and it is not surprising that it should have led to litigation. It is contended on the part of the company, which, of course, means the shareholders, that the contract to take the property at £110,000 ought to be wholly rescinded, and that the Defendants, or some of them, ought to be directed to pay the whole sum and interest. It is asked on the ground of wilful misrepresentation and suppression of facts on the part of Baron *Erlanger* and the other persons who were engaged in the formation of the company. I do not find that they are in express terms charged with fraud, but wilful misrepresentation and suppression of known facts to induce persons to act in the belief of the facts which are misrepresented, and in ignorance of others which are suppressed, is clearly fraud, and the bill must therefore, I think, be treated as founded on fraud. I expressed an opinion at the close of the argument, to which I adhere, that it would not be justifiable on the part of the promoters to charge a company double the price which had been given for the property without clearly satisfying themselves that it was worth the increased price. Was there, then, on this subject of value, any representation made which there was not reasonable ground for believing to be true? I have read the prospectus as to the profits anticipated. [His Lordship then read paragraph 37 of *Erlanger's* answer, and continued:—] Messrs. *Pickford & Winkfield* were the brokers employed by the old company, and were gentlemen who, of all others in the world, must have known what the value of the property was, for every cargo of phosphate which had come to the British dominions appears to have been sold by them. And *Erlanger* says: "Inquiries were also made by or on behalf of the syndicate of Messrs. *Pickford & Winkfield*, the brokers employed by the old company in the sale of the phosphate, and on the 6th of September, 1871," that is, a fortnight before the company was registered, "*Thomas Westall* received from *William Pickford*, a member of the firm of Messrs. *Pickford & Winkfield*, a letter, which he then communicated to me." [His Lordship read

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the letter.] Considering the very favourable opinions which were entertained in all quarters of the probable success to be derived from the working of the island, I am unable to come to the conclusion that the prospectus contains any statement as to the valuation of the property which there was no reasonable ground for believing to be true. The statements are certainly highly coloured and sanguine. But everyone knows that this is the case with all prospectuses issued upon the formation of joint stock companies. That they are not fraudulent, and that they were believed to be true, is, I think, shewn by the fact that the vendors took £30,000, part of the price of £110,000, in shares; and that Baron *Erlanger* and those associated with him still have a favourable opinion of the ultimate prospects of the company, is, I think, shewn by the fact to which my attention was drawn by Mr. *Benjamin*, that at the time this bill was filed they continued to hold a large number of shares.

This case is, therefore, not like the one I recently decided of the *Phosphate Sewage Company* v. *Hartmont*, where the shares were evidently taken merely for the purpose of traffic, and almost everybody concerned, and particularly the principal Defendant, sold, I think, three times over the amount of the whole capital of the company.

The next statement in the prospectus, which was much relied upon by the Defendants, is, that the directors had entered into a contract to purchase the property for £110,000. It is very short: "The directors have entered into a provisional contract to purchase the property, including the lease of the island, as from 29th September, 1871, together with all buildings, plant, fixed and rolling stock, machinery, steam-engines, lighters, &c., now at the island, complete and in full working order, for the sum of £110,000." It was contended that this was a false statement or misrepresentation, that the "directors" meant all those who were named in the prospectus. The only three who acted in the transaction were Sir *Thomas Dakin*, Mr. *Evans*, and Admiral *Macdonald*. M. *Drouyn de Lhuys* did not act, and Mr. *Eastwick* was then in *Canada* or on his way there, and it was contended that in consequence this was an untrue statement. I think that this statement cannot be read in the strict sense which is contended

for by the Plaintiffs, but that the true meaning is that the company was formed on the basis of paying £110,000 for the property.

This point has given me much anxious consideration, and I cannot say that I am perfectly satisfied that the construction I have put upon the statement does not admit of doubt. There is much force in the contention of the Plaintiffs that, when the prospectus gives the names of five directors, and says that "the directors" have entered into a contract, the fair meaning is that the five have done so; and if that be a proper view of the statement, it is clearly untrue, inasmuch as two of the five had nothing whatever to do with the contract, and with regard to the three who did sanction it at the first meeting of the directors of the 29th of September, it is plain that Sir *Thomas Dakin* was the only one of them who was in a situation to exercise an impartial judgment, having taken his seat upon the basis of taking fifty shares in the company, for which he afterwards paid in cash. Mr. *Evans* was at once the vendor and purchaser, and was the agent of *Erlanger*, and interested on his behalf in obtaining the £110,000, which he fixed as the price to be paid for the property. Admiral *Macdonald* was also disqualified, as the shares he held were the property of *Erlanger*, and he was, under the circumstances, necessarily bound to act in his interest, and was not in a situation to act impartially for the protection of those who might take shares in the company. I find nothing to blame in the conduct of Sir *Thomas Dakin*, except a singular want of caution in not inquiring into the price at which the property had been acquired by the promoters of the company, and also in signing the minutes in which it is stated that the contract of the 30th of August was produced. It appears that he did that. [His Lordship then referred to the parts of the answer of *Dakin* explaining his position in reference to the adoption of the contract by the company, and the meeting of the 2nd of February, 1872, and continued:—]

Having read those passages in the answer of Sir *Thomas Dakin*, I am perfectly satisfied that in the whole transaction he acted with perfect good faith, but I have stated that it is possible that greater vigilance on his part, as the only independent director, might have prevented the formation of this unfortunate company, or led to its being formed on a more satisfactory basis as to price and otherwise.

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It was contended on the part of the Plaintiffs that although three directors were by the articles of association to be a quorum, that must mean three of the full number of the directors required, which were at least five, and as the three who attended the meeting were the only directors, they were not capable of binding the company, and that their contract could not therefore be enforced. For this contention, *Kirk* v. *Bell* (1) and *Howard's Case* (2) were relied upon. If I had a case before me in which the contract of the three directors was attempted to be enforced, I should probably be bound by those cases to say that it could not be enforced. But this is a bill to rescind a contract which has been performed, and where the parties who performed it, by entering into possession of the purchased property, had ample means of ascertaining the facts before they performed it. I cannot, therefore, apply those cases to the present, and therefore it is not necessary to consider whether the *Thames Haven Dock Company* v. *Rose* (3), cited by Mr. *Fry*, is still law, where it was decided that a clause in an Act of Parliament that there should be twelve directors, and that five should be a quorum, was directory only, and that a call made when there were seven directors only could be enforced.

It was also contended that the prospectus is defective, because it omits any reference to the contract of the 30th of August, by which *Evans*, on behalf of *Erlanger*, purchased the property. I have already stated that in my opinion the company had nothing to do with the acquisition of the property by *Erlanger* and the syndicate. The shareholders were invited to inspect the contract of the 20th of September, which recites that of the 30th of August, and although it does not state the price to be paid for the property, that could have been readily ascertained by inquiry on asking for an inspection of the contract; and I cannot think that persons who join joint stock companies are justified in forbearing all inquiry and investigation as to documents which they are told may be seen. Upon this point the judgments in the case of *Overend, Gurney, & Co.* v. *Gibb* (4) are strongly against the Plaintiffs.

The last misrepresentation relied upon by the Plaintiffs is, that

(1) 16 Q. B. 290.
(2) Law Rep. 1 Ch. 561.
(3) 4 Man. & G. 552.
(4) Law Rep. 5 H. L. 480.

in the prospectus it is said that a report made after careful survey estimates the deposit at 700,000 tons at the least, and that for ten years there has been a steady and continuous supply in proportion to the labour and capital employed, the fact being that the report referred to was made in 1865. But it appears there was still more than the quantity stated to be upon the island, and certainly more than could be worked during the continuance of the lease. [His Lordship then referred to the evidence in support of that conclusion, and continued:—]

Upon the whole case, it cannot be denied that the result has been disastrous to the shareholders, and I am glad to find that Baron *Erlanger* appears to have felt that they had a strong claim upon him, in consequence of the way in which they have been misled, and that he offered a considerable concession to them before the institution of this suit. [His Lordship then referred to the letters proposing a settlement, and continued:—] I am bound to say I think the whole body of the syndicate would have acted very wisely, and only fairly, on that occasion, if they, like Baron *Erlanger*, had offered to give up all the profit they had made. I believe that was an offer which involved, on the part of Baron *Erlanger*, not less than £16,000, which was his share of the profit made by the re-sale of the property to the company. If the other members of the syndicate had concurred in that view, it is plain that the company would have been satisfied, and this litigation would have been saved. That was not accepted, and the operations of the company have been continued.

Then comes a very material circumstance, which the learned counsel for the Defendants, and particularly Mr. *Benjamin*, pressed upon me—that the losses and the disastrous condition of the company are to be attributed to a great fall in the price of the phosphate. It seems that the price rapidly went down; that it fell from £5—which the evidence shews that they received, and might reasonably expect to be the price at the time—to £4, and even less; and now, according to the evidence of Mr. *Mackay* in cross-examination, the price is improving, and the prospects are somewhat improving also.

There is one thing which I ought not to pass over, and that is the very forcible remarks which were made with regard to Mr.

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Westall. It was argued that this was a case in which I ought to set aside the contract, because *Westall*, so far as I know, a respectable solicitor, who died in June, 1872, was to receive a sum of £500. But I do not, on the whole, see any reason to question the honesty of the transaction on the part of Mr. *Westall.* I think the sum of £500 was a fair remuneration which he might expect to receive for carrying the business into complete effect. I cannot consider that, therefore, as a bribe given to him for the purpose of deceiving others, nor do I find anything improper in that transaction.

Upon the whole case, I find it impossible to make a decree which would do complete justice. It would not, in my opinion, be just to make the extreme decree which is asked for by the Plaintiffs, and I can find no ground for the alternative relief which is asked for in the return of the difference between what was given and received for the property.

Looking at all the circumstances of the case, the large profits made by Baron *Erlanger* and the members of the syndicate, the rigging of the market which took place with their sanction, and in which operation £6000 or thereabouts was expended, I cannot dismiss the bill with costs. Upon the whole, the nearest approach to the justice of the case I can make is to dismiss it without costs against all parties. Sir *Thomas Dakin* has had no connection with the transaction to which I have just referred, such as the rigging of the market, but the want of caution on his part obliges me to refuse to allow him any costs. The bill, therefore, will be wholly dismissed without costs.

C. A. The company appealed, serving their notice of appeal only on the members of the syndicate and their representatives. The appeal was heard on the 21st, 23rd, 24th, and 26th of February, 1877.

Argument. *Higgins*, Q.C., *Davey*, Q.C., and *Alexander Young*, for the appeal, argued on the same grounds as were taken below. They contended that the case was distinguishable from *Gover's Case* (1), which went on the ground that *Mappin* was not a promoter at the time of the

(1) 1 Ch. D. 182.

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transaction. That the quorum of directors was incompetent: *Kirk* v. *Bell* (1). They referred also to *Imperial Mercantile Credit Association* v. *Coleman* (2), *Aberdeen Railway Company* v. *Blaikie* (3), *Tyrrell* v. *Bank of London* (4), and *Lindsay Petroleum Company* v. *Hurd* (5).

Cotton, Q.C., *Fry*, Q.C., and *Ingle Joyce*, for *Erlanger*, took the same grounds and referred to the same authorities as in the Court below.

Benjamin, Q.C., and *Everitt*, for Colonel *Sturt* and Sir *James Anderson*.

J. Pearson, Q.C., and *Romer*, for other members of the syndicate.

Bristowe, Q.C., and *W. W. Karslake*, for Mrs. *Vilmet*.

Bristowe, Q.C, and *Kekewich*, for *Beer*.

Whitehorne, for *McEwen's* trustee.

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The questions which have been very elaborately argued in this case appear to me to resolve themselves into very simple ones. The action—for although it is a suit by bill I shall use the modern name—is by a company against certain persons who were the promoters of that company, and who were the vendors to the company of a lease of the island of *Sombrero*, in the *West Indies*, containing deposits of phosphate, and also against some other Defendants who were directors of the company at the time the contract was entered into. The object of the action is to set aside the contract upon the ground that it was a contract unfairly obtained, and was not binding on the company. The defences set up are that it was fairly obtained; that whether it was fairly obtained or not, the company has by its laches or acquiescence precluded itself from suing; and, thirdly, that whether or not the

(1) 16 Q. B. 290.
(2) Law Rep. 6 H. L. 189, 206.
(3) 1 Macq. 461.
(4) 10 H. L. C. 26.
(5) Law Rep. 5 P. C. 221.

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company has so precluded itself, it is not a transaction which could be set aside by the company, though damages might be claimed in an action by individual shareholders against those persons who made misrepresentations to them to induce them to accept their shares.

In order to explain the views which I take of the matter, it is necessary to state shortly some of the material facts. It appears that this island of *Sombrero* belongs to the British Government and that they had granted a lease of it, which lease became vested in a limited company, which was ordered to be wound up, and of which Mr. *Chatteris* had become the official liquidator. It further appears that the lease of the island is really a valuable property, and Mr. *Chatteris*, having it to sell, absolutely refused to sell it under £55,000. It appears that he so refused after having taken advice, and having come to the conclusion that it was really worth the money. It also appears that other persons who were acquainted with the substance which this island produces thought it a valuable concern, and applied to a foreign financier, Baron *Emile Erlanger*, who carries on business both in *London* and in *Paris*, and was then in *London*, stating that it was a good speculation to buy the lease at the price they mentioned, which was less than £55,000, and even ultimately at £55,000. The result was that Baron *Emile Erlanger* associated with himself various friends and acquaintances of his to take part in the enterprise, which was supposed to be a good speculation, and they formed what is called a syndicate, or joint partnership adventure, to buy the concern, and no doubt to sell it at a profit; for that, I think, is what they intended to do, though there is a suggestion that they might possibly work it themselves in the meantime. All that appears to me to be *bonâ fide*. There was a *bonâ fide* intention on their part when they gave this money for the lease of the island to realize a profit from it, and they thought it was worth at least the money which they gave for it. That being the position of matters, the members of the syndicate left the management of the purchase, the management of the resale, and the getting up of a company if it proved necessary or desirable to sell the lease to a limited liability company, entirely to Baron *Emile Erlanger*. He was, so to say, the managing partner of the adventure. No doubt what he did he

did on behalf of himself and the others, he must be taken as their common agent, and I think they are legally liable for what he did. But beyond that, I think there is nothing affecting their personal position or their character in any way. I think it my duty to say that, because some misconstructions might otherwise be put upon the judgment I am about to pronounce.

That being the position of matters, we find that on the 30th of August, 1871, there is an agreement made between *Chatteris* and the Defendant *Evans* to sell for £55,000. I cannot exactly find out what Mr. *Evans* is. He is indirectly connected with the business of Baron *Emile Erlanger*. What that means I do not know. The evidence before us is very meagre, but it does tell us so much as this. Baron *Erlanger* says: "The Defendant *John Marsh Evans* was frequently at my office, and he had not, nor has he any direct connection with my firm or business." But he says he selected him as a proper person to take an active share in the management of the business if they should work it on their own behalf. He is described in the contract as of *Leamington*, in the county of *Warwick*. He does not appear to have ever resided at *Leamington*, but to have resided in *Paris*, and his only connection with *Leamington* was that he had a sister living there whom he sometimes visited. Beyond that, the exact position of Mr. *Evans* is not ascertainable from the evidence in this cause: but that he was the agent of Baron *Emile Erlanger*, and in that capacity the agent of the syndicate, is fully and frankly admitted. That he was the paid agent is admitted. He was to have some remuneration for his services. It does not appear at what time exactly the amount of that remuneration was settled, but it certainly was settled at a period long subsequent to the formation of the company, and as far as I understand, the amount then given to him was 100 shares in the company. That was an amount which in Baron *Emile Erlanger's* opinion exceeded his expectations. In that way it was an unexpected remuneration. But it appears to me, at all events, he was an agent, entitled to be paid, and if he had not been paid he could have brought an action against Baron *Emile Erlanger* for the amount to which he was fairly entitled. The next person who must be mentioned is Mr. *Westall*. Mr. *Westall* was a solicitor—he is dead now—who had a share in intro-

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ducing the matter to Baron *Emile Erlanger*, and he seems to have made a bargain which I hope is not very common, that he was to have £500 for his services; and that bargain seems to have been fulfilled, for he duly received the £500 from Baron *Emile Erlanger*. He was employed also and throughout as the solicitor of the syndicate, and so remained up to the time he was appointed solicitor to the company, which was some days after the formation of the company.

There are two other persons whose names it is necessary to mention, and I must say I mention them with anything but pleasure. The first is Sir *Thomas Dakin*, who is an alderman of the city of *London*, and at the time when these events happened was Lord Mayor. He was a director of the company. He seems to have become a director at the solicitation, or at the request or suggestion, of a Mr. *Pincoffs*, whose name also appears in the matter, and who was, I understand, a clerk and agent of Baron *Emile Erlanger*. I do not think it right that any slur should be cast on Sir *Thomas Dakin's* character by what has occurred in respect of his connection with this company. It appears to me that there is nothing in his conduct except an amount—I will hardly say of negligence—but want of attention to the affairs of the company, and which I am afraid was rather calculated upon by some one or other of the persons who induced him to join. Filling, as he did, the position of Lord Mayor, no doubt his name would be a great attraction in the city of *London* and elsewhere, and perhaps it was not expected that a gentleman in that position would pay much attention to the affairs of the company. I think the mistake he made was in accepting the office at all. A man should not accept an office voluntarily, the duties of which he cannot adequately fulfil. But beyond that, I do not think it would be fair, as far as I am concerned at all events, to censure further what he did in the matter. The next person who must be mentioned, and I mention him with still greater regret, is Admiral *Ronald John Macdonald*. He was a director of the company, and his position is rather a painful one to contemplate. He appears, as his title would denote, to have been an officer of high rank in the navy, and he seems to have been applied to under the circumstances to which I am going to allude. I prefer reading it from

the documents, to using my own language on the subject. In the 47th paragraph of the Baron's answer he says this: "The Defendant *Ronald John Macdonald*, Rear-Admiral in Her Majesty's navy, in the bill called *Reginald John Macdonald*, having asked me some time previously if ever I had the opportunity to recommend him for some profitable occupation in the City in which his knowledge and experience might be of use, it occurred to me that he would be a very proper person in this case to be a director, particularly as I knew him to be well acquainted with the island of *Sombrero*." A correspondence took place between the Baron and the Admiral, which is in evidence, and which I will read: "12th September, 1871. My dear *R. J. M.*—I hope to be able to make you a director of a very good thing in good company, £150 a year. When will you be back in *London?* I shall want you at the beginning of next week. Yours, *Emile*." Then on the 21st of September, 1871, which is the day either of the registration of the company or the day after, because there is a little dispute whether it was registered on the 20th or the 21st, and it is not very material,—we have this letter:—"21st September, 1871. My dear *R. J. M.*—You will be pleased to see your first introduction into the city of *London* by the enclosed prospectus" (that is, the prospectus of the company). "I shall have you sent for when wanted. Yours faithfully, *Emile*." Then the next letter is a letter from the Admiral, dated, apparently from the answer, on the 28th of September. I think the true date must be the 29th of September, which was the day when the meeting of the board really took place, and the letter refers to that. It is in these terms:—"My dear *Emile*,—How odd it appears writing from your office. I have just returned from the first meeting of our board, and all seems most satisfactory. You know my unfortunate monetary position; tell me what I can or ought to do as regards shares, &c. I really have no disposable money at present, and if I had I could not afford to risk any, not that I consider there is any risk in the undertaking. For appearance' sake, would you allow some of your shares to go in my name, and I need not say it would be just the same as if you took them yourself, as all advantage should go to yourself. Please advise me through your broker, or through Mr. *Evans*, who has been most kind and courteous to me." In answer

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to this the Baron, who is then at *Frankfort*, writes:—"1st October, 1871. My dear *R. J. M.*—I am very glad you like the *Sombrero*, and hope it will open you a successful career in the City, and deliver you from the only trouble you seem to have, but mind you don't turn your good spirits by becoming a rich man. It is quite understood that we lend you the fifty shares necessary for your qualification. *Ludwig* knows about this" (that is, the Baron's brother), "and you speak to him. With kindest messages from the whole family, yours, *Emile*." He says in the 55th paragraph of his answer: "I believe I wrote to my brother, Baron *Ludwig*, to put the Defendant *Ronald John Macdonald's* mind at ease on the subject of his letter, but what arrangement was actually made I never knew until very recently, when I was informed that Mr. *Louis Floersheim*, a member of the syndicate, advanced £500 to the Defendant *Ronald John Macdonald*, with which he paid for his shares, and that the said *Louis Floersheim* debited me with the amount." I must say, however unpleasant and painful it may be to me to say it, that I lament to see a British admiral in this position. I am very sorry to see that he should allow himself to be made what I cannot call otherwise than the mere tool of the financier; and I cannot consider him anything else than an agent of the Baron for all purposes, and not an independent person entitled to act as a director or to enter into contracts on the part of the company. As regards both him and Mr. *Evans*, I entirely concur with the remarks of the Vice-Chancellor in his judgment. Now, having got three directors, it was thought desirable to have two more. There was a prospectus of the company to be issued to the public, and of course the more good names or attractive names could be obtained, the more likely the company was to be floated. They, therefore, put two other names. When I say "they," I must throughout be understood to mean Baron *Emile Erlanger* and his agents, Messrs. *Evans* and *Westall*, and to some extent, perhaps, Mr. *Pincoffs*, who seems to have taken some, although a subordinate, part in the matter. They put in as a director a well-known French statesman, M. *Drouyn de Lhuys*, who was at that time resident in *France*. His name was well known in this country from the part he had taken in French politics, and partly from the fact of his having been ambassador to this country. But he was

resident in *France*, and I am satisfied that it was neither expected nor desired that he should take an active part in the management of this company. There is still one other name in the list of directors. That is also a well-known name—the name of Mr. *E. B. Eastwick*, C.B. and M.P.—no doubt a name which it was supposed would commend the company to public notice. I think it was neither expected nor desired that Mr. *Eastwick* should take an active part in the affairs of the company. He was in *Canada*, and known to be in *Canada*, and not likely to return to this country for some time. Therefore we have a selection of five directors, two of whom are abroad, one is the actual agent of the promoter for conducting the sale, another is the mere puppet of the promoter, and the last is the Lord Mayor of *London*, who was not likely to take an active part in investigating the preliminary history of the contract which he is asked to confirm. That may or may not be called "craft and subtle device," that is mere matter of opinion, but I think the mode of nominating the directors was at least singularly well adapted to obtain a body which would sanction this contract.

We now come to the position of the agreement for sale to the company. The agreement, which was made on the 30th of August by *Chatteris* to sell for £55,000, was to be completed in November. On the 15th of September that agreement was sanctioned by the Vice-Chancellor. About that date, probably a few days before, but certainly some time before the 20th of September, it was arranged to bring out a limited company to purchase this leasehold property. The 20th of September is the date of the memorandum and articles, though it is said that the company was not really registered till the next day, because Mr. *Chatteris*, though his purchase-money was not payable until November, insisted that no company should be registered until the purchase-money was paid, which delayed the actual registration until the 21st. When we come to look at the memorandum and articles, which are admitted to have been the work of the promoters, we find that there are no *bonâ fide* shareholders in the ordinary sense. Seven gentlemen signed the memorandum. The first is *John Marsh Evans* for fifty shares; then Mr. *Pincoffs* for thirty shares; and then there are some nominal parties for five shares and ten shares

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each. The directors named by the articles of association were the five whom I have mentioned. Now, as I have already explained, it was impossible to get together more than three directors, because the other two were abroad; so we find that by the 77th clause, "three directors shall form a quorum for the transaction of business." So that here is an arrangement made by which any two of these three might carry any resolution they pleased. That being the position of matters, we find that Mr. *Evans*, whose name was inserted in the contract with Mr. *Chatteris* as the actual purchaser, enters on the same 20th of September into a contract with Captain *Pavy*, who was, of course, the mere nominee of *Erlanger*. By this contract *Pavy*, on behalf of the company, agrees to purchase of *Evans* for £110,000, to be paid as to £80,000 in cash, and as to £30,000 in fully paid-up shares; the contract between *Chatteris* and *Evans* being recited, but the price of £55,000 not being stated, and a statement being made that it is believed the property is worth £110,000.

The next step that is taken is to prepare a prospectus. As far as I can see, that was contemporaneous. There is no doubt the prospectus was submitted in draft for the approval of Baron *Emile Erlanger* himself, and that it was finally drawn up and settled by his agents under his instructions. When everything was ready, the next step that is taken after the registration is to obtain a meeting of the directors, which takes place on the 29th of September, 1871. Up to this time Mr. *Westall* was the solicitor of the syndicate; and, as far as I can find, he was the solicitor of no one else. On this day, the 29th of September, three directors meet—Mr. *Evans*, Admiral *Macdonald*, and Sir *Thomas Dakin*. At that meeting the contract between *Evans* and *Pavy*, which was a conditional contract, not binding unless adopted by the company, is adopted by the board of directors. Mr. *Westall* and his partner are named as the solicitors of the company, and the prospectus is directed to be issued to the public. This prospectus was issued, and attracted a very large number of shareholders. The shares having been subscribed for, the company directed possession of the property to be taken some time in the following month of October. They paid the £80,000 on the 2nd of November to the Baron *Emile Erlanger*, they allotted the fully paid-up

shares to Mr. *Evans*, and they were re-distributed by him; and at that time the contract was completed, with the exception that there seems never to have been an assignment of the legal estate, which apparently remains in Mr. *Evans*, the vendor.

I will make one or two observations about the prospectus. First of all the prospectus is complained of, and I think fairly complained of, upon the ground of its containing this statement: "A report made after careful survey estimates the deposit at 700,000 tons at the least, and for ten years there has been a steady and continuous supply, proportionate to the labour and capital employed." I should have thought, and I suppose any one would have thought, that that referred to a recent report and a recent survey. It turns out, however, that the report was made in 1865 and the survey in 1864. There is one other matter which is very important. As regards this contract all we have is this: "The directors have entered into a provisional contract to purchase the property, including the lease of the island, as from the 29th of September, 1871, together with all buildings," &c., "for the sum of £110,000. Copy of this contract, which is dated the 20th of September, 1871, and made between *John Marsh Evans* of the one part, and *Francis Pavy* on behalf of the company of the other part, may be seen at the office of the company's solicitors." If the shareholders had gone to see it (and I think in a Court of Justice they cannot complain that they did not see it, but must be treated as having notice of its contents) they would have found a recital of the contract from *Chatteris* to *Evans*, omitting the price, and they would have found a statement that it was believed the property was worth £110,000; but that whatever defects were afterwards found out, it was to be taken without compensation. It is to be observed that here some very material things are omitted. Now, this prospectus was issued, in my view of the case, by the promoters. It was actually prepared by them, and was brought ready printed to the meeting. It was nominally adopted by the directors; but, as I said before, I look upon two out of three directors as merely agents for the promoters, and their adoption would not make it more or less the act of the promoters. It was, in fact, the prospectus of the promoters. It does not state who the real vendors are, and it does not state what the price they gave

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for it was. Now, understanding, as I do, that the promoters of a company stand in a fiduciary relation to that company which is their creature; in this case that is emphatically so, for up to this time there was not really a single *bonâ fide* shareholder distinct from the promoters. Even Sir *Thomas Dakin*, when the prospectus was issued, had not taken any shares, although he intended to take some, and did ultimately take fifty and paid for them; acting as a director of the company, he would be liable to take them, but he had not taken them at that time. Now persons in a fiduciary position must make a full and fair disclosure when they are about to sell property to those towards whom they stand in that relation. Is it a fair thing to omit stating that they themselves are the owners of the property? That, I think, is obviously not fair. Is it a fair thing to omit to state they have just purchased the property at the valuation sanctioned by the Court of Chancery for half the amount? I do not think it is absolutely necessary that in all cases the price given should be stated; but, looking at the peculiar position of the parties, I think it was necessary here, though even if it had been stated, I do not think, looking at the other circumstances of the case, that my judgment would have been different from what it is now.

The next point is this: It is stated that the directors have entered into a provisional contract to purchase the property from *Evans*. Was this true? I think it was a very material misstatement. First of all, the statement is, "the directors." Now it was quite impossible that "the directors" could mean the two or the three gentlemen who on the 29th of September approved of the contract, because the contract is dated on the 20th, and it so appears on the face of the prospectus. It is stated to have been entered into by "the directors." That must mean the five gentlemen named as directors. There is, therefore, a representation that those five people have entered into this contract. But then it was said "they tell you that *John Marsh Evans* is the vendor." It becomes still more important then, when you see that one director is himself the vendor, to know that you have four persons of high position who would be likely to exercise great care and caution before joining a concern of this kind, and to take the trouble themselves to investigate the matter before they entered

into the provisional agreement. But, as I said before, the statement was not true. The directors had nothing whatever to do with the provisional contract; it was really entered into by the promoters, and it was not sanctioned by anybody on behalf of the company until the 29th of September. It is nothing more than a mere sham contract, a thing entered into by one agent of the promoter to sell, with another agent of the promoter to buy; there really was nothing more in it when it had been adopted than when it was entered into; and it was not a transaction which could in any sense bind the company.

Then how does the representation made by the prospectus to the shareholders become material? It is a question of substance. These gentlemen who were nominated as directors had a duty to perform, not to the then nominal shareholders, who were nobodies—there were really none, although there were persons who had agreed to take shares—but to the future shareholders who were to form the real company; and if it could be shewn that every human being who came into the company took his shares upon a full disclosure of every material fact, it might well be that the payment by the company of the purchase-money out of funds which had been subscribed under those circumstances would be a sufficient confirmation. But it is not pretended that every one of the shareholders knew the facts. As far as I know no one appears to have known them except one single individual. That being the position of matters, can it be said that there was any binding contract at all upon the company? I think not. I think the promoters being, as I said before, in a fiduciary position, not only having avoided making a complete disclosure, not only having concealed material facts, but having also misrepresented material facts, there was no binding contract on the company.

Then it is said, assuming that to be so, this is not a case in which the company can get rid of the contract. It was said, first of all, that it would be doing great injustice, that if we rescind the contract and order the return of this property, which appears to be, as I said before, a valuable property, though not worth so much as £110,000, we shall thereby enable the company to obtain more than the value of the property, and divide it not only amongst those shareholders who knew nothing about the matter,

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but also amongst several shareholders who knew all about it. It is said that is not doing justice, and that the suit cannot be maintained in this form, because it will not do justice. But that argument goes too far, because it would apply to a case of the grossest fraud in every instance in which one or more of the actual shareholders of a company took part in that fraud. If the argument were once allowed to prevail, it would only be necessary to corrupt one single shareholder in order to prevent a company from ever setting the contract aside. It may be said you give to the shareholder, who was a party to the fraud, a profit, because he will take it in respect of his shares, and since as between co-conspirators there is no contribution, therefore his brother conspirators, who are made liable for the fraud, cannot make him repay his proportion. But the doctrine of this Court has never been to hold its hand and avoid doing justice in favour of the innocent, because it cannot apportion the punishment fully amongst the guilty. A dozen parties to a fraud may be defendants, and one decree or judgment go against all, and if it is a fraud of such a character that none of them can bring an action for contribution, the plaintiff may at his will and pleasure enforce that judgment against any one of them, and perhaps pass over the most guilty of them; still there is no remedy as between those who commit the fraud. It is one of the punishments of fraud that there is no such remedy, and that a guilty party, though not the most guilty, may suffer the greatest amount of punishment. It is one of the deterrents to men to prevent their committing fraud. I do not see any ground of natural justice or any ground of policy which should prevent the Court rescinding the contract in the case I have put.

Then it is said that though this may be a general rule, it does not apply to a case where a company is formed for the sole purpose of carrying on the business which has been purchased, and that if the company rescind the contract the effect will be that the funds will be distributed in a manner different from that which is prescribed by the *Companies Act*, 1862. To that I think there are two answers. First of all, that is not the case with this company. When you come to examine the articles and memorandum of association you will find that it is formed for purchasing or leasing and working the mines, &c., in the island of *Sombrero*, and power

is given to the company by the 82nd article, first, to adopt and carry into effect the particular contract in question; secondly, to alter or vary at their discretion "any contracts or engagements by or on behalf of the company, or the terms and conditions thereof, or the time or manner at or in which any payment or securities, or obligations in respect of any such contract or engagement, may be payable, and make such payments, securities, or obligations payable at other times, or in another manner than may have been originally agreed upon, or grant or enter into a new or other contract or engagement in lieu thereof, or in exchange therefor;" and, thirdly, "they may apply for and accept, for and on behalf of the company, all or any concessions, grants, confirmations, powers, and privileges from Her Majesty or from foreign governments." First of all, they could enter into a new contract, if they thought fit, at a different price with the Defendants after the rescission of this contract. Secondly, assuming that to be improbable or out of the question, they could apply to Her Majesty for a grant in reversion after the expiration of the fourteen years of a lease of this island, and work it on the expiration of the present lease. Therefore it is not true that this company will necessarily come to an end, unless they are minded to put an end to it by the rescission of this contract. But even if it were true, it appears to me to make no difference as a question of law. If a company is formed to buy a building estate and erect houses upon it, and they are grossly defrauded both as to the title and the nature of the property bought, is it to be said that the party committing the fraud is not to be made liable to take back his worthless property because thereby the company would cease to carry on business? I cannot see the equity of alleging that by way of defence. It appears to me rather an aggravation of the offence committed by them, which has given so many worthy people so much useless trouble in forming a company which altogether fails by reason of the fraud practised upon them. It appears to me, therefore, there is nothing in that defence.

It is only necessary to notice one more defence. It was said, at all events the company is prevented by laches and acquiescence from now seeking to rescind the contract. They paid for the lease in November, 1871, and shortly after that time they began to

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work the phosphate. They have worked it, it is stated, until the time of filing the bill, or, at all events, after the meeting of June, 1872, when the inquiry took place, and they had notice, so it is said, as early as February, 1872, at the general meeting of the company, of all the material facts, and they chose, because they then had a flourishing report sent over by their manager from the island, to continue to work the business and carry on the trade of mining in the island, knowing the nature of the transaction which is now complained of. First of all, as a question of fact, I think the facts are not made out from the report of the meeting. All that took place was this:—[His Lordship here stated what was said at the meeting as above.] Sir *Thomas Dakin* was in the chair, and what he says is this: "I read very carefully the prospectus, knowing the character of the liquidator, who vouches for the figures, I went entirely on the prospectus put before me when I was asked to take shares. Looking to the prospectus, and the names connected with it, I went by that, and joined the company, believing then, as I have since reason to believe, it is an important company," &c.; shewing clearly that he had made no investigation, and nobody supposes that he did, or that any one did. As I said before, it is not very likely that the others did. "I do not know anything at all about the sale or purchase of this matter, but I have heard some rumours as the prior shareholder has. I made inquiries, and I am told Mr. *Evans* bought this, with other gentlemen, fully a month before the company was thought of or projected." Therefore his inquiries really come to nothing more than this—he imagined Mr. *Evans* was one of the real purchasers, and that he bought it with other gentlemen. Then he goes on to say: "It was looked upon that he had got a bargain, and cheap." So that he did not even then know the facts, and what he had heard was a mere rumour, not an ascertained fact at all. Then he goes on to say: "If they clearly stated what the arrangement was, I do not think we have any reason to complain. It appears to me the contracts between Mr. *John Marsh Evans* and Mr. *Pavy* on behalf of the company were stated in full in the prospectus, and all those persons who joined the company were invited to look at them. Whether it cost £50,000 or £100,000 I do not think is material to the question." Then he goes on to say: "I did not ask any question whether the purchaser made money by a good

bargain, the question is whether the thing is fairly stated in the prospectus, whether it is worth what is given for it, and whether it is likely to produce a profit to the shareholders." That is all that takes place about the matter and then it drops. The substance of the thing is this, that an outside shareholder has heard some rumours of an indistinct character, and the chairman has heard some rumours of an indistinct character too. Neither of them knows the facts, and that is gravely represented as a notice to the company—notice, that is, not merely to the men who attended the meeting, but notice to those absent from the meeting, and notice to the whole company of the true state of facts which should immediately have put them upon inquiry, under the penalty of having the transaction, which was open to rescission, confirmed, simply because they did not act immediately. I must say, anything more flimsy in the shape of information I have never seen—a shareholder getting up at a public meeting and simply saying he had heard rumours, the chairman saying he knew nothing about it, but he had heard some rumours. It appears to me that is utterly insufficient to affect the company with notice at all, and even if it had been, the company must have had time to make inquiries. They could not have appointed a special committee to make inquiries at that meeting; they do at the next meeting in June, and then a correspondence takes place. These bodies cannot move very fast, they must have fair and reasonable time, and it does not appear to me that sufficient time elapsed to preclude them from rescinding the contract if they were otherwise entitled to rescind it.

This, I think, disposes of all the defences upon the main point, and it only remains now to notice a single defence made on behalf of *Vilmet*, who, it was said by Mr. *Bristowe*, ought not to be made liable even if the other members of the syndicate were made liable. Now *Vilmet* was an original member of the syndicate. He died after the suit was instituted, and his executors were made parties by amendment. It was contended on their behalf that as this was in the nature of an *actio personalis*, the executors cannot be made liable after his death at all. But the answer to that is simply this, it is an action against partners. They are all jointly and severally liable for the acts of misfeasance committed by their

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managing partners. It is not a mere action for damages brought against the testator, but it is one to make his estate liable in common with his partners, and the action has no relation to those singular actions which have been held to die with the person, according to a doctrine which certainly should not be extended in the present day so as to do injustice as between the estate of the dead man and his living co-partners. It appears to me there is no ground whatever for the suggested distinction, and that judgment should be pronounced for a rescission of the contract against all the Defendants who were members or representatives of members of the syndicate. Of course there is no case as against the directors who were not members of the syndicate, and as they are not now before the Court there is no occasion to say anything about them.

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James, L.J.

JAMES, L.J.:—

In this case the Vice-Chancellor appears to have proceeded, to a great extent, upon what was supposed to have been said in *Gover's Case* (1). Now I adhere entirely to what I said in *Gover's Case*, that is to say, it is quite open to a man to buy any property, at any price he likes, with a view or in the hope of selling that property to any company that he can get to buy it, if that is the mode in which he intends to dispose of it. A man may buy at any price, and may sell at any price that he can get fairly for it. But that has nothing whatever, as it appears to me, to do with the question in this case, which is, whether a man who has so bought at a low price has obtained a higher price fairly and properly in accordance with the view which the Court of Equity takes of such transactions. Now, in this case it appears to me that the decree follows almost necessarily from two or three propositions. A promoter is, according to my view of the case, in a fiduciary relation to the company which he promotes or causes to come into existence. If that promoter has a property which he desires to sell to the company, it is quite open to him to do so; but upon him, as upon any other person in a fiduciary position, it is incumbent to make full and fair disclosure of his interest and position with respect to that property. I can see no difference in this respect between a promoter and a trustee, steward or agent.

(1) 1 Ch. D 182.

Such full and fair disclosure was not made in this case by the syndicate, which syndicate, it is admitted, were the promoters. Perhaps, as to the extent to which they and Baron *Erlanger*, on their behalf, were the promoters, the real founders of the company, it may not be unimportant to refer to one or two passages in Baron *Erlanger's* answer: "As soon as it was determined by the syndicate to offer the property for sale to a public company, the said *Thomas Westall*" (who was the solicitor of the syndicate) "prepared the memorandum and articles of association of such a company, and he accordingly did so, and applied to the Registrar of Joint Stock Companies to register the same." Then a little further on he says this: "With this object I applied to M. *Drouyn de Lhuys*, in the bill named, who was the president of the *Société des Agricultures de France*, and I requested Mr. *Frederick Pincoffs*, to whom I had promised a small participation out of my own share, to apply to the Defendant, Sir *Thomas Dakin*, who was then Lord Mayor of *London*, to whom he was well known, and who was, as I was informed, intimately connected with the trade in chemical products; and the Defendant *Ronald John Macdonald*, Rear-Admiral in Her Majesty's Navy, in the bill called *Reginald John Macdonald*, having asked me some time previously if ever I had the opportunity to recommend him for some profitable occupation in the City in which his knowledge and experience might be of use, it occurred to me that he would be a very proper person in this case to be a director, particularly as I knew him to be well acquainted with the island of *Sombrero*, having had for some years the supreme naval command in those quarters. I accordingly applied to the Defendant *Ronald John Macdonald* to become a director." And then further on he says: "Shortly before the registration of the Plaintiff company, *Edward Backhouse Eastwick*, C.B., a Member of Parliament, applied to me personally to be allowed to join the board of directors of the Plaintiff company," shewing, of course, that Baron *Erlanger* was the entire master of everything that was done and that has been done in the company. I think he says somewhere else that the syndicate registered the company. That was their position. Now they did not state the fact anywhere that they were the real vendors—the nominal vendor, in whose name everything appeared to be, was a

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gentleman of the name of *Evans*, to whose position in relation to Baron *Erlanger* the Master of the Rolls has referred. It is said, "they knew that they were going to give £110,000 for the property, and what does it signify whether they were giving £110,000 to Baron *Erlanger* or to Mr. *Evans*?" It is not for us to say what motives may influence men's minds, or how people may be influenced by not having that full disclosure which the rules of equity require persons in a fiduciary position to make, but I can for myself conceive it to make a very great difference indeed in the minds of persons minded to speculate in such matters, whether they were buying a property which Baron *Erlanger* and his associates were selling, or whether they were buying a property which Baron *Erlanger* and his associates were buying with them. The fact that Baron *Erlanger* was concerned in getting up and promoting a company, must, in my judgment, have oozed out. If anybody had asked M. *Drouyn de Lhuys*—if anybody had asked Alderman *Dakin*—if anybody had asked Admiral *Macdonald* or Mr. *Eastwick* anything about this company, they would only have said, "Baron *Erlanger* is joining it, and therefore we can have no doubt it is a very good company;" and anybody who had heard that *Erlanger* was the promoter of the company, that he was the person getting it up, and the person with whom they were to be partners, would have said, "It must be a very good thing indeed." Therefore, it is not a technical rule at all which requires that a vendor who in any respect is in a fiduciary position should tell the exact truth, should say he is the vendor or state the interest that he has. Therefore, upon that broad principle, I think that this company, discovering the fact, whenever they discovered the fact, that the full disclosure which the rules of equity require had not been made, were entitled to have the contract set aside. Then it is said, and the Master of the Rolls has dealt with it, that there was knowledge, and with knowledge acquiescence or laches on the part of the company. I mentioned, in the course of the argument, that that meeting at which it was supposed this knowledge was acquired, or this knowledge was supposed to exist, so far from being, according to my view of the case, at all in favour of the Defendants' contention, was very much indeed in favour of the Plaintiffs' view, by shewing that

there had been practically a successful concealment, because if all the shareholders, or if many shareholders, or any shareholder other than those who were concerned in the transaction, had known the real facts of the case—had known that Baron *Erlanger* had bought for £55,000 and was selling for £110,000, it could by no possibility have been mentioned in the way it was by Mr. *Stephenson* at that meeting, saying, "I have heard a rumour." In the cross-examination I think it came out that he had heard it in the train going to or coming from *Brighton*—that that which they were offering for £110,000 was bought a few days before for £55,000. Nobody said, "We all know it—it is perfectly well known." Sir *Thomas Dakin*, the chairman, did not say, "I know it perfectly well." He says, "I have heard a rumour of the same kind myself, but the company is a very good one, and we had better not trouble ourselves too much about it." That does not prove any knowledge up to that time acquired, and to say that such talk among shareholders assembled at a *pro formâ* meeting—the first meeting of the company—and not for that purpose, but for the ordinary business to be transacted at that meeting, is notice by which the company is to be bound, seems to me to be rather a *reductio ad absurdum*. But before the next meeting probably the rumour had become more frequent, knowledge had become more spread about it, and at the same time people had been stimulated into inquiry by finding that the property was not so good a property as they were told it was. No doubt they were stimulated by that, and at the next meeting, in the month of June, the whole capital having been paid only in the month of October before, suspicions are excited, a committee is appointed, and that committee makes its inquiries, and within a very reasonable time after that, in December, 1872, the bill is filed. There rarely has been a case with less of delay, less of acquiescence, and less of laches than this case.

Then it is said that the company is not the proper Plaintiff, because the company is composed of different shareholders, having different interests, and that it is impossible to do equity between the Defendants and the different shareholders, if you do not allow every shareholder to file his own bill or bring his own action against the persons who misled him. No doubt a shareholder

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might have an action against the individuals who wilfully deceived him—a shareholder may have that, more particularly under the new Act of Parliament, the new section for concealment of material documents. But the ordinary remedy of a shareholder in a case of this kind would be to say, "You, the company, through and by your directors, led us into the thing—we want to rescind the contract by which we became shareholders." The remedy of the shareholder is to be relieved from his character of shareholder, and the company alone has a right to deal with the contract to which the company as a company is party. Supposing the contract had been a contract by which the company was bound to-day to pay £100,000, it would be impossible for the present shareholders to say, "We are not bound by that—you go and sue the shareholders who were shareholders at the time of the contract." Suppose the converse of the present case—suppose this company, by bribing Mr *Chatteris* (if such a thing can be supposed possible), had bought for £55,000 from the old company that which they knew was really worth £110,000, against whom would a bill be filed to set aside that sale? Against the company. It would be no answer then to say, "You must go to the shareholders who did it—you cannot come upon the company—the company is now composed of different shareholders, and therefore you must go back to the persons who were then shareholders." The company represent the contracts of yesterday as of to-day, as they will the contracts of to-morrow or the next day, or next year. They represent the contracts which were made by the company; they are liable upon the contracts, and they have every right in respect of those contracts which an individual being would have if he had the like case or was under the like liability. Therefore, I am of opinion that the company not only can sue, but that the company was the only proper Plaintiff that could sue upon the case made by this bill. I am of opinion, therefore, that all the defences fail, and that the decree which the Master of the Rolls proposes to make is the right decree.

Baggallay, J.A. BAGGALLAY, J.A.:—

I am of opinion that the Appellants are entitled, as against the Respondents other than Mr. *Macnaghten's* and Mr. *Lewin's* clients,

to a decree substantially in accordance with the relief prayed by the first two paragraphs of the prayer of the Plaintiff's bill. In arriving at this conclusion, I assume that at the time of the purchase of the *Sombrero Mine* by the syndicate, as represented by Baron *Erlanger*, through the agency of Messrs. *Evans* and *Westall*, neither of these gentlemen stood in any fiduciary position to the company which was subsequently formed. I treat the transaction as an honest purchase of the property by the syndicate with the intention of realizing a profit either by reselling it or by working the mine themselves, but with no intention of forming the company they subsequently promoted. They had this mining property, and they had a perfect right not only to sell it to a company, but also, provided they did it in a proper manner, to form, or join in forming, a company for the purchase of it. Here, again, I may say, that as at present advised, not having heard any reply from the Plaintiff's counsel, I see no reason for thinking that the syndicate, or the active members of it, or their agents, had any reason to think that the price they were asking was extravagant or unreasonable in amount. We come then to consider the circumstances under which the company was formed and the contract entered into and adopted. It was adopted, and the syndicate were, in substance, not only the vendors of the property, but also the promoters of the company, and in such a case the syndicate, as promoters, being in a fiduciary relation to the company, it was essential that the public, who were invited to become, and who were expected to become, the shareholders of the company, and to constitute the company, should have the fullest information as to all the surrounding circumstances. I need not refer in detail to what really took place, as the Master of the Rolls has done so in a very exhaustive manner. But I can hardly conceive anything more carefully arranged for concealing that information which it was essential should be afforded, than the course pursued by the promoters upon the occasion in question. As soon as the promoters had determined to form a company, a memorandum and articles were prepared by Mr. *Westall*, the solicitor of the syndicate, and naturally in a form well adapted to carry out the objects which the syndicate had in view. A contract was then entered into by Mr. *Evans*, the agent of the syndicate, in whose name the

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original purchase had been made, with Captain *Pavy*, who under the circumstance of there being at this time no other intended shareholders of the company than the syndicate and their friends must also be treated as the agent of the syndicate. This contract, the terms of which I need not particularly state, is then approved by a board of directors constituted in a very singular manner. The articles had named five directors, as to two of whom it was improbable, if not quite impossible, that they could act at the time the contract was adopted and confirmed. It was in fact adopted and confirmed by a board composed of three directors. One of these, Mr. *Evans*, was admittedly disqualified by reason of his interest in the subject-matter. It cannot, in my opinion, be doubted upon the evidence before us that one of the remaining two, Admiral *Macdonald*, was simply the nominee of, and intended to become a trustee for, Baron *Erlanger*, the active member of the syndicate. As regards the remaining director, Sir *Thomas Dakin*, I can see no reason to doubt his perfect *bona fides*. He had consented to become a director upon the faith of the prospectus, a draft of which appears to have been handed about amongst the syndicate and their friends. He offered to take and did take and pay for fifty shares; so that he had a considerable stake in the company. It is impossible, however, not to appreciate the influence which indirectly, if not directly, must have been exercised over both Sir *Thomas Dakin* and Admiral *Macdonald* by their previous intercourse with Messrs. *Evans* and *Westall* and the presence of those gentlemen at the meeting of the 29th of September, at which the contract was approved and the prospectus ordered to be issued. As regards the prospectus, I desire to make one observation. I rather gather from the judgment of the Vice-Chancellor in the Court below that he was of opinion that more information was really given by that prospectus than it appears to me was actually and in substance given. It is quite true that in one passage it is stated that a "copy of this contract which is dated the 20th of September, 1871, and made between *John Marsh Evans* of the one part, and *Francis Pavy*, on behalf of the company, of the other part, may be seen at the office of the company's solicitor;" and it has been argued that the reference here to the agreement of the 20th of September, 1871, taken in connection

with what appears in the earlier part of the prospectus, to the effect that Mr. *Evans* was one of the directors of the company, was an intimation to any person who read the prospectus that one of the directors was the vendor. It is quite true that if the prospectus were carefully spelt out, and the paragraph at the end compared with the paragraph at the beginning, some such conclusion might be arrived at. But I do not think it a necessary consequence, or that it would at once strike any person reading it, more particularly as it is quite possible that a person might think that Mr. *Evans* being a director, the information given was all that was essential, and that ought to be given. Then, again, I think that the attention of persons reading this prospectus would be diverted from any such consideration. They might have gone through the prospectus itself and seen by what is stated in another paragraph that the directors had entered into a provisional contract, and when they saw the names of five directors—for this would imply that all the directors named had entered into the contract—when they saw the names of the directors and the high position they occupied, they would naturally be led away from doing that which perhaps they might otherwise, as prudent men, have done, go to the office of the solicitor and ask to see the memorandum and articles, ask to see the contract, and if they had done so they would have seen a reference to another contract, but no recital as to the price given for the property. I think, therefore, that the prospectus does not give that amount of information which should have been given; and taking all these various circumstances together, it appears to me that the promoters did not fulfil their obligation to give the fullest and fairest information to the purchasers.

JESSEL, M.R.:—

The judgment will be to set aside the contract, to direct the repayment of the £80,000 with interest at £4 per cent., to direct the return of those shares which have not been parted with, and to take an account of those shares which have been sold or parted with and of the proceeds of such sales, with interest at the same rate from the time of the receipt of the moneys, the company accounting for the profit (if any) derived from the island. The

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Defendants will be jointly and severally liable for the proceeds of the shares sold, for, the members of the syndicate being partners, no distinction can be made between them. Mrs. *Vilmet*, not admitting assets, will be liable in due course, in the same way as the assignee of a bankrupt. Upon payment the company must restore the island to the syndicate.

Solicitor for Plaintiffs: *John Holmes.*

Solicitors for Defendants: *Bischoff, Bompas, & Bischoff; Carr, Bannister, Davidson, & Morriss; White, Broughton, & White; Roberts & Barlow; Kearsey, Son, & Hawes; Freshfields & Williams; Cunliffe & Beaumont.*

C. A. 1876 V.-C. M. *Dec.* 21. C. A. 1877 *Feb.* 14.

WELLS *v.* LONDON, TILBURY, AND SOUTHEND. RAILWAY COMPANY.

[1876 W. 415.]

Railway Company—Extinguishment of Rights of Way—Private Way.

The Plaintiffs had been entitled from 1855 to a carriage-way to property of theirs over a railway by a level crossing. By an Act of Parliament obtained by the company in 1875, reciting that it was expedient that the rights of way in respect of certain footways which crossed the railway on the level should be extinguished, it was enacted that all rights of way in, over, or affecting the footways numbered 2, 4, 5, 6, and 7 on the deposited plans should be extinguished. No provision for compensation was made. The roadway in question was numbered 5 on the deposited plans, and was thereon marked "roadway and footway," the others being marked simply "footway":—

Held (affirming the decision of *Malins*, V.C.), that upon the true construction of the Act, it did not interfere with private rights of way, but only with public rights of footway, and that an injunction restraining the railway company from obstructing the way had been rightly granted.

Statement.

THIS was an action to restrain the company from interfering with a private right of way.

The right of way in question arose under an agreement dated the 21st of March, 1854, between *W. C. Wells* and *I. Perry*, who were owners of certain lands in the parish of *Leigh*, in *Essex*, through which an intended railway was to pass, and the *Eastern*

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Counties Railway Company and the *London and Blackwall Railway Company*, who were applying for an Act authorizing the making that part of the railway which passed through those lands. This agreement recited the title of *Wells* and *Perry* to certain property and to the soil of a roadway between different parts of this property, over which roadway it was stated that "the public have certain rights of way," and by it *Wells* and *Perry* agreed to sell certain land to the companies and to withdraw their opposition to the bill, and the companies agreed that they would make and for ever maintain "a level crossing over the said intended line of railway where it passes through the said roadway, with proper gates and protection, over which level crossing the said *W. C. Wells* and *I. Perry*, their heirs, tenants, and assigns, shall have the free way of passage with horses, carts, waggons, and carriages."

Wells and *Perry* withdrew their opposition to the bill, which became an Act, and in the following year they conveyed to the companies the land which they had agreed to sell to them, "except and always reserved unto the said *W. C. Wells* and *I. Perry*, their heirs, tenants, and assigns, out of the conveyance hereby made, a right of crossing on the level the line of railway of the said companies where it passes through the said roadway, over which level crossing the said *W. C. Wells* and *I. Perry* shall have a free passage with horses, carts, waggons, and carriages."

The level crossing was made, and the right of way over it to certain property retained by *Wells* and *Perry* was enjoyed by them without interruption till 1876. It was not clear that the public had any right of footway over it, and it appeared most probable that they had not, though they had to some extent used it.

The undertaking afterwards became vested in the *London, Tilbury, and Southend Railway Company*, which succeeded to the rights and obligations of the two companies.

By the *London, Tilbury, and Southend Railway Act*, 1875 (38 & 39 Vict. c. lvii.), it was recited that it was expedient that the company should have power to acquire further lands for sidings and other purposes, "and that certain footways in the parish of *Leigh*, in the county of *Essex*, which are now crossed by the

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railway of the company on the level, should be dealt with as by this Act provided, namely, that as regards five of such footways the rights of way in respect thereof should be extinguished, and that the other footway should be carried by a bridge over the railway." And by sect. 6 it was enacted, "All rights of way in, over, or affecting the following footways in the parish of *Leigh*, viz., the footways numbered respectively 2, 4, 5, 6, and 7 upon the deposited plans, shall, so far as regards the land and railway of the company, cease and be extinguished, and when and so soon as the foot-bridge shewn upon the deposited plans as a substitute for the present level crossing of the railway by the footway numbered 3 on those plans is made and open for use, all rights of way in, over, or affecting that footway so far as regards the present level crossing shall cease and be extinguished."

The Act did not provide any compensation for the extinction of these rights of way.

The roadway now in question was that numbered 5, and was described on the deposited plans as "roadway and footway;" and in the book of reference the railway company, *Wells* and *Perry*, and the surveyors of highways, were entered as the reputed owners. Each of the other four ways was marked in the plans as "footway," and was indisputably a public footway.

In 1876, the company, considering that the rights of *Wells* and *Perry* over the roadway were extinguished, put a fence across it on each side of the railway. *Wells* and *Perry* thereupon commenced this action, and moved for an injunction. The motion was heard before Vice-Chancellor *Malins* on the 21st of December, 1876.

Glasse, Q.C., and *Nalder*, for the Plaintiffs.

Higgins, Q.C., and *Ferrers*, for the company.

Judgment, V.-C. M.

MALINS, V.C., thought that the Legislature could hardly have intended to stop a private road, the right of which was secured by contract, and that it was a serious question whether the Act was intended to deal with anything but public footways. His Lordship accordingly held that, as the stopping the way to the Plain-

tiffs' premises was a serious damage to them, an injunction ought to be granted to keep the way open till the hearing.

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The company appealed. The appeal was heard on the 14th of February, 1877.

Argument.

Higgins, Q.C., and *Ferrers*, for the appeal motion:—

The Act does not purport to deal only with rights of footway, but it extinguishes "all rights of way in, over, and affecting the following footways." The word "footway" is merely used as a way of designating the place. There is no right of public way over this spot, and if the Plaintiffs' rights are not extinguished, the clause is inoperative as to it. The words used there are sufficient to extinguish all rights of way, private as well as public. If the Legislature meant what is contended for on the other side, why did it not say "all public rights of footway"? Suppose an Act extinguishing "all rights of way over the horseway called *Rotten Row*," could the Duke of *St. Alban's*, as Grand Falconer, retain his right of driving over it? The company are willing to give compensation.

Glasse, Q.C., and *Nalder*, for the Plaintiffs, were not called on.

JAMES, L.J.:—

Judgment, C. A. James, L.J.

I am of opinion that there is no foundation whatever for this appeal.

The construction of the Act of Parliament seems to me clear. The Legislature was dealing with public, not with private, rights of way. The company's predecessors in title had agreed with the Plaintiffs that they would "maintain a level crossing over the said intended line of railway where it passes through the said roadway with proper gates and protection, over which level crossing the said *William C. Wells* and *I. Perry*, their heirs, tenants, and assigns, shall have the free way of passage with horses, carts, waggons, and carriages." That was the right which the Plaintiffs had. Then an Act of Parliament was passed stopping rights over footways, and making no provision for compensation, which always is done if it is intended by Parliament, at the request of a com-

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pany, to take away a private right. This is a strong reason for holding that private rights were not intended to be affected, and there is nothing in the Act of Parliament which compels us to suppose that the Legislature intended to commit the injustice of taking them away without compensation. Then, to shew that it was intended to use the word "footway" as merely descriptive of the *locus in quo*, and not of the nature of the right, we were referred to the deposited plan; but that plan, so far from making out the Defendants' contention, is very strong in favour of the Plaintiffs, for this particular way is described upon it as a roadway and footway. I am of opinion that the Plaintiffs' contention is right.

Judgment, C. A. James, L.J.

Bramwell, J.A. BRAMWELL, J.A.:—

I am entirely of the same opinion.

I agree that we ought to construe this Act of Parliament according to the fair meaning of the words, even supposing the true construction of the Act does an injustice to the parties. But we may well approach the construction of an Act of Parliament of this kind in the belief that it was not intended to confiscate a private right, for this would be a simple case of confiscation, and we ought not to suppose that this was intended by the Legislature or sought for by the railway company. The statute recites that it is "expedient" that the rights of way therein mentioned should be extinguished. But it certainly is not expedient that a private right should be taken away without making compensation. The Legislature, in an act providing for the execution of public works, never takes away the slightest private right without providing compensation for it, and the general recital that it is expedient that the works should be done is never supposed to mean that in order to carry them out a man is to be deprived of his private rights without compensation. That, on the Appellants' construction of the Act, would be the case here, because, although Mr. *Higgins*, on behalf of his clients, offers to make compensation, the Act does not compel them to do so, and I do not know whether they shewed any intention to do so before they got into trouble in this action. The contention of the Appellants, therefore, really is, that the Plaintiffs' private right is confiscated for the benefit of the company. That is what the Legislature never does. As regards

public rights, inasmuch as there is no person particularly affected, and it is impossible to deal with all of the persons affected and to give them all compensation, such rights are often abolished by the Legislature without compensation, the benefit which the public gains being considered an equivalent for the right it loses; but the plans are first deposited, and any person having a title to represent the public in respect of such right, as, for instance, a churchwarden or a surveyor of highways, may contest the case on the part of the public. Now let us see what this Act of Parliament says. [His Lordship read the recital.] I do not hesitate to say that the true construction of that is that it refers only to public footways. You may, indeed, say that a man has a right of footway, but when a footway is spoken of generally, without any reference to any individual or any particular property, it means a public footway.

Now let us see how far that view is confirmed by the facts, because the Court has a right to look at the surrounding circumstances to see what the meaning is. It is admitted beyond all doubt that the other footways are public footways, and I do not think it material whether this was a public footway or not. If there were no public rights of way over it, the only consequence of that is that the Legislature, in the description of the place, have made a mistake and have called it a footway when it is not so. But that does not alter the character of the Act so as to make it deal with private footways. The Legislature supposes that the public has or may have a right of footway over the spot, and the promoters of the bill, in order to extinguish any such way if it existed, put it into the Act of Parliament and have dealt with it as a public way, but that does not take away the private right of way. Therefore I am satisfied that the Plaintiffs' right of carriage and footway is wholly unaffected.

I quite agree that if it could be made out that the Act referred to the private footway of the Plaintiffs, there would be strong reason for contending that, under the words "all rights of way," the right of carriageway over the footway would be extinguished. But if you expound the Act of Parliament as, in my opinion, it ought to be expounded, no such difficulty arises. The Legislature is dealing with public rights, and what it says is in effect, "All

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rights of the public over these footways are extinguished, and if there is any other public right of way over them it is gone." But the private right of footway and carriageway is, to my mind, utterly unaffected.

AMPHLETT, J.A.:—

I am of the same opinion, and have not been able to satisfy myself that there is any reasonable doubt upon the question. By the agreement of March, 1854, it was provided that the Plaintiffs should "have the free way of passage with horses, carts, waggons, and carriages," over this roadway. I apprehend that the free right of way with horses, carts, waggons, and carriages, gives also a right of way without horses, carts, waggons, or carriages. The greater right carries with it the lesser, and I should, if it were necessary to decide the question, say that the footway, as well as the way with horses, carts, waggons, and carriages, was secured by the agreement, but it is not necessary to give any positive opinion upon that subject. That being the right which the Plaintiffs had enjoyed by contract for twenty years, we come to the Act of Parliament, and the question is whether it is to be so interpreted as to take away that right: and I agree, if the language used in the Act is clearly to that effect, although it may lead to great injustice, we must give full effect to it. Now, we must construe the Act, looking at the circumstances, and looking not only at the enactment but at the recital. The recital is, that "it is expedient that" the rights of way in respect of certain footways, of which this is one, should be extinguished. That is the language which Parliament is apt to use when dealing with public rights. The railway itself being of public utility, the Legislature frequently deals with public rights in this way, and ordinarily shews what its object is by saying "That it is expedient." Now, it cannot be expedient to take away a man's private property without giving him compensation; but it may well be expedient that certain public footpaths crossing the railway on a level should be stopped. Parliament, without providing compensation, might fairly say, We will prevent the public going over there, because it may be dangerous to the public; but if the company granted a private right to an individual there would be no reason at all for interfering with that. It

appears to me that Parliament has left the right of way granted by the agreement entirely untouched, but has prevented the general public from having the right of using that road. Then it is said that you cannot secure to individuals a right of way without allowing the public also to use the right, and that, practically, you cannot stop one without stopping the other. That is an entire mistake. The company might put gates across and allow no one to pass but the Plaintiffs and their servants, or give them a key to enable them to pass in and out whenever they wished to do so. That, however, really is a question with which we have nothing to do. It appears to me that the rights of the Plaintiffs under the agreement are not touched by the Act of Parliament.

Solicitors: *Hollingsworth, Tyerman, & Andrews; E. Woodard.*

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[1876 N. 97.]

Right of Way—Award under Inclosure Act—Road for Agricultural Purposes.

By an award under an Inclosure Act, it was directed that certain of the allottees and the owners for the time being of their allotments should for ever thereafter have a way-right and liberty of passage for themselves, their respective tenants and farmers, as well on foot as on horseback, and with their carts and carriages, and to lead and drive their horses, oxen, and other cattle from the common highway over the east end of the allotments to their respective allotments, doing as little damage to the soil or the corn, grass, or herbage, as might be, and in case the allottees should "street out" the way, that the same should always remain eleven yards wide, but the road was not to be a way of right for any other persons whomsoever than as aforesaid. The owner of one of the allotments commenced building houses upon it, and began to lay down a metalled road where there had only been an ordinary cart-track over the adjoining allotments:—

Held (affirming the decision of *Malins*, V.C.), that the allottees were not confined to the use of the road for agricultural purposes only, but were entitled to construct a substantial roadway suitable for the purposes to which the land was now in course of being applied.

Statement.

IN 1760 an Act was passed for inclosing common lands at *East Coatham*, in *Yorkshire*. By the award made in pursuance of this Act, being in form a deed to which all the allottees were parties,

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the commissioners allotted to *Richard Agar* a portion of the common, containing 7A. 0R. 4P., and directed that he should maintain the southern and eastern fences. The award conferred upon *Agar* and some other allottees a right of way in the following terms:—

"The said commissioners do hereby award, direct, and appoint that the said *W. Turner*, *R. Agar*, &c., &c., and the owner and owners for the time being of the lands hereby to them respectively allotted, shall for ever hereafter have and enjoy a way-right and liberty of passage for themselves and their respective tenants and farmers of the said lands and grounds, as well on foot as on horseback, and with their carts and carriages, and to lead and drive their horses, oxen, and other cattle, as often as occasion shall require, from the common highway leading from *Redcar* aforesaid to the north-east end of the said *R. Agar's* aforesaid allotment in the said *East Stoney Butts*, and from thence to the said old enclosures called *West Dyke Closes*, in, over, and through the east end or part of their said respective allotments in the said *East Stoney Butts* and *Upper Half Acres* to and from their said respective allotments without interruption, or paying any consideration for the same, doing as little damage to the soil or the corn, grass, or herbage as may be."

The award also directed that in case the said allottees, or any of them, or any of the owners for the time being of their respective allotments, should "street out" the same way leading through their said respective allotments, the same should be made, and should for ever remain, eleven yards broad, at the least, between the quick-sets, but that such way was not, nor was intended to be, admitted to be a way of right for any other person or persons whomsoever than as aforesaid.

In pursuance of this award a road was set out with a quick-set hedge on each side of it, being of the required width of thirty-three feet.

The Defendants were the owners of a portion of *Agar's* allotment. The Plaintiff was the lord of the manor, and also the owner of the land adjoining the highway mentioned in the award. The road set out by the award from *Agar's* allotment to the above-mentioned highway ran over part of the lord's said land.

The Defendants had commenced building upon their land a number of villa residences, and for more convenient access to them they had commenced forming a solid granite road in lieu of the common cart road which had for many years existed there; and they were also about to erect a bridge across a small stream called the *Stell*, which formed the boundary between the land allotted under the award and the highroad.

Statement.

The Plaintiff thereupon commenced this action, asking for an injunction restraining the Defendants from erecting a bridge across the *Stell*, so as to rest upon or otherwise interfere with the piece of land belonging to the Plaintiff situate on the south side of the highroad, and from making a road upon the eastern boundary of the Plaintiff's said piece of land, and from exercising any rights of ownership thereupon, and from using the same piece of land otherwise than in accordance with their rights under the award, whereby, as the Plaintiff alleged, a right of road solely for agricultural purposes over the Plaintiff's said piece of land was given to the owners for the time being of the Defendants' land: and for damages for wrongfully entering the Plaintiff's piece of land and erecting the said bridge and making the road.

The Plaintiff moved for an injunction as above. The motion was heard before Vice-Chancellor *Malins* on the 21st of December, 1876.

When the case was opened *Glasse*, Q.C., for the Defendants, submitted, for the purpose of the present application, to an injunction as to the bridge proposed to be erected over the *Stell*.

Argument.

Higgins, Q.C., and *Procter*, for the Plaintiff:—

The right of way is confined to such a right of way as was reasonably necessary according to the condition of the land at the time of the award, *i.e.*, a way for agricultural purposes: *Wood* v. *Saunders* (1); *Wimbledon and Putney Commons Conservators* v. *Dixon* (2); *Williams* v. *James* (3); *Cowling* v. *Higginson* (4); *Allan* v. *Gomme* (5); *Ballard* v. *Dyson* (6); *Neath Canal Company* v.

(1) Law Rep. 10 Ch. 582.
(2) 1 Ch. D. 362.
(3) Law Rep. 2 C. P. 577.
(4) 4 M. & W. 245.
(5) 11 A. & E. 759.
(6) 1 Taunt. 279.

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Ynisarwed Railway Company (1); *United Land Company* v. *Great Eastern Railway Company* (2).

[The VICE-CHANCELLOR referred to *Dand* v. *Kingscote* (3).]

That only decides that the grantee of a mine is entitled to a way-leave sufficient to enable him to get the coal in the most approved way.

Glasse, Q.C., and *W. W. Karslake*, for the Defendants, were not called upon.

Judgment, V.-C. M.

MALINS, V.C.:—

It appears that in pursuance of the award made under the *Inclosure Act* of Geo. 2 a road was set out, now more than a century ago, with a quick-set hedge on each side of it of the required width of eleven yards, and the object of the present motion is to restrain the use of that road for any other than agricultural purposes.

Now, for the purpose of a road of this kind, so great a width as eleven yards was not required. If it was merely for agricultural purposes, a much less width would have been sufficient, though if it were for public purposes generally, the whole of the width would be required; because I suppose a road of some fourteen feet would be sufficient to enable carts, carriages, and waggons to pass each other. Therefore the centre of the road might be used for that purpose, and the sides might be allowed to be in grass, or they might sow corn if they liked. But, at all events, if the road in the centre is used, the lord of the manor, or the proprietor of the adjoining land—in this case he is the proprietor of the adjoining land—in one capacity or the other, is entitled to the land not used for the purpose of the road. This case has been argued as if it were a case of a right of way of one man over the land of another, or in other words, what we may call an easement. Where there is a dominant tenement, the owner of the dominant tenement is the one who has the right to use the easement, and the man subject to the easement is called the owner of the servient tenement; and if this were the case of a dominant and servient tenement, possibly

(1) Law Rep. 10 Ch. 450. (2) Law Rep. 17 Eq. 158; Ibid. 10 Ch. 586.
(3) 6 M. & W. 174.

and probably I should be obliged to apply to it the doctrine of the numerous cases which have been cited. *Allan* v. *Gomme* (1), *Cowling* v. *Higginson* (2), *Ballard* v. *Dyson* (3), and, above all, that case of the *Wimbledon and Putney Commons Conservators* v. *Dixon*, which is the most recent decision of the Master of the Rolls, affirmed by the Court of Appeal (4). All those cases were cases of easement, or of accommodation for one man or one owner over the lands of another. But this is an inclosure, and every Inclosure Act that I have ever seen or heard of, not only directs the commissioners to inclose the lands, but also to lay out the roads which are for the use of those to whom the land belongs. Accordingly this award directs that the allottees shall for ever thereafter have and enjoy a right of way in manner therein prescribed. This, in my opinion, is a mere arrangement among the owners of the lands inclosed. It is not for one man having a mere right of way over the soil of another, but they are to have and to enjoy a way. It is said this is a way, and therefore not a road. I think it makes not the slightest difference whether it is called a road or a way. They are to have a way or a road, "and liberty of passage for themselves and their respective tenants and farmers of the place, lands, and grounds, as well on foot as on horseback, and with their carts and carriages, and to lead and drive their horses, oxen, and other cattle as often as occasion shall require."

At that time it was merely agricultural land, and, as agricultural land, as I understand, it has continued to be used until a very recent period. The Defendants are owners of one of these closes adjoining this lane, or road, or way. In progress of time the Defendants have found it expedient and to their interest to use this land for building purposes. Accordingly, I understand the plan is to make it available for cottage residences, and on these seven acres of land to put about twenty-six dwellings. Now, I am at a loss to see any principle on which a person who takes land under an inclosure is bound for all time to use that land for the purpose for which it was used when the inclosure was made. If that is the case here, it is the case all over the country; and I suppose hundreds of thousands,

(1) 11 A. & E. 759.
(2) 4 M. & W. 245.
(3) 1 Taunt. 279.
(4) 1 Ch. D. 362.

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if not millions, of acres of land would have this principle applied to them, that the owner of the land under the inclosure could only use the land for the purpose for which it was used when the inclosure was made, that is, for agricultural purposes; because, although they might use the land for other purposes, they could not use the roads for other purposes. The consequence would be most seriously detrimental to the interests of society in general. What is the true principle in such a case as that, where you have a right of way on a road for horses, carts, and carriages of every description; for there is no limit? Mr. *Higgins* suggests it must mean farm carriages, because the word farmer is used here. But all the tenants would not be farmers. It does not specify that the land is to be kept as agricultural land. It is for the tenants generally; not only the farmers, but whatever tenants they have on this land, are to use the road for any purpose they require. This is a right of way not for agricultural purposes only. The award does not say that. It is to be used as a right of way generally for any purpose for which the right of way should be required.

I have no doubt whatever that the proper construction is that it is not the case of an easement in any way, but it is the case of a grant of a road, which road is to be used for all purposes.

Then it is said, you must keep this road as it has for a long time been kept, a mere agricultural lane, that is, grass land, with a track in the centre, I suppose, on which, if you were to go with a carriage, you would find yourself much inconvenienced, and in wet weather you would probably sink in. Because it has been used in that way, you must use it for all time in that way. I read it as a grant of a road to be used for any purpose for which any road can be beneficially applied. Now, if I want to know what sort of a road it may be, I rely on two decisions on that subject, and the leading case, in my opinion, is that of *Dand* v. *Kingscote* (1). In that case a landowner sold an estate, reserving a right of way to and from a colliery. It was two centuries ago that the grant was made, and two centuries ago, I need not say, no one ever thought that there would be such a thing as a railway. It was then contended that, because the right of way was granted in 1647, when

(1) 6 M. & W. 174.

railways were not known, the proprietor of the colliery was not entitled to make a railway for the purpose of transmitting his coals where they were to go, but was bound to carry them in the old fashion, by a waggon or a tramroad, drawn by horses. But the decision was that he was entitled to construct a railway for the purpose, because by no other mode was it possible he could carry on a colliery in the existing state of things, at a profit. Therefore the decision in *Dand* v. *Kingscote* (1) was, that a reservation of a right of way from and to the colliery entitled the man who had the right to adapt it to the improvements of the age, and the improvements of the age required he should have a right to use a locomotive over the land. If there is any other case to refer to, I think it is the case of the *United Land Company* v. *Great Eastern Railway Company* (2), which I decided originally, and which was affirmed on appeal. What was the case there? There was a piece of land which, at the time of the grant of right of way, was used for agricultural purposes, and which it was in the last degree improbable would ever be used for any other purpose, because it did not at that time seem to be adapted for any other purpose. But in progress of time it was found expedient to build on that land. There was a right of way over a railway, and this argument was again used, that the right of way was only a right of way for the purpose for which the land was used at the time the right of way was granted. I took a wider view of the case. I decided it meant a right of way for all purposes for which the land could be lawfully used in all time, and my decision on that subject was affirmed on appeal. Now, here is a right of way which, in my opinion, means a right of way over these lands for all purposes to which it can be applied. Then if it is a right of way, it follows from *Dand* v. *Kingscote* it is a right of way to be used in the most beneficial manner in which such right of way can be used for the time being; and turning this agricultural land into building land and erecting human dwellings on it, necessarily requires, in my opinion, that the right of way to it should be such as would be available to the person who uses it, and enable him with ordinary facility to get to his dwelling-houses instead of having to go dragging through an agricultural lane with his carriages perhaps let in up to the axle

(1) 6 M. & W. 174. (2) Law Rep. 17 Eq. 158; Ibid. 10 Ch. 586.

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of the wheels, or destroyed altogether. Therefore I am of opinion, on the principle of *Dand* v. *Kingscote* (1), that the right of way is one including the right of improving from time to time according to the improvements of the age, and as this right of way can only be used by metalling or laying down some hard material which shall enable the parties to pass over the land with facility, I think the motion should be refused. I am of opinion that this is a right of way in the most extensive terms that can be used, and that the Defendants are entitled to do all they have attempted to do, except to build the bridge, about which I give no opinion. My decision is, therefore, that the motion as to the right of way must be refused. But the interim order must be continued as to the bridge.

The Defendants will have the right to proceed with the construction of their road, including the right to deposit slag on the land and to repair it. I mean them to have the fullest right of metalling the road and making it the best road they can to meet the circumstances.

C. A. The Plaintiff appealed. The appeal was heard on the 21st of February, 1877.

Argument. *Higgins*, Q.C., and *Procter*, for the Appellant:—

This was a right of way to the whole allotment, and even if the Defendants, as owners of part of it, have any right of way, they cannot split up the field into a number of small lots with houses on them, and use the way for each. It has never been decided that a right of way continues after partition of the dominant tenement: *Gale* on Easements (2); *Bower* v. *Hill* (3). Then we say that the way is a way only for agricultural purposes: *Wimbledon and Putney Commons Conservators* v. *Dixon* (4); *Wood* v. *Saunders* (5). The reservation of the way to "farmers" indicates agricultural use only. By the Roman law, the owner of a right of way was not entitled to lay it down with stones: *Gale* on Easements (6). There is a provision in the award that the grantees are to do as little damage as may be to the grass and soil;

(1) 6 M. & W. 174.
(2) 5th Ed. p. 569.
(3) 1 Bing. N. C. 549.
(4) 1 Ch. D. 362.
(5) Law Rep. 10 Ch. 582.
(6) Page 554.

the laying down a metalled way is in violation of this. Assuming even that when the houses are built the Defendants will have a right to make such a road as is necessary for convenient approach to them, they are premature in making such a road now.

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[They also referred to *Pomfret* v. *Ricroft* (1), *Rowbotham* v *Wilson* (2), *Allan* v. *Gomme* (3), and the cases mentioned in the judgment of the Vice-Chancellor.]

Glasse, Q.C., and *W. W. Karslake*, for the Defendants, were not called upon.

JESSEL, M.R.:— Judgment, C. A. Jessel, M.R.

I think that this appeal cannot be maintained. The first question to be considered is, what is the effect of the grant? It is not very artificially worded, but we must look at it with regard to the nature of the case. The inclosure was carried out in a way that was common in former times, by a deed to which all the allottees are parties. [His Lordship read the clauses, which are set out above.]

The first point made was this: It was said that as this was a grant to the owner and owners for the time being of the lands, if the lands became severed the owners of the severed portions could not exercise the right of way. I am of opinion that the law is quite clear the other way. Where the grant is in respect of the lands and not in respect of the person, it is severed when the lands are severed, that is, it goes with every part of the severed lands. On principle, this is clear. It never could have been contemplated in the case of an award like this that the property was never to be divided, nor is it to be contended that if a man died and left two or three daughters co-heiresses, and they partitioned the estate, the right of way was lost, and their allotments for ever deprived of access to the highway. But, in addition to that, I think that the case is fairly covered by authority. In *Harris* v. *Drewe* (4) a pew was granted by a faculty to *John Emery* and his family for ever, and the owners and occupiers of the said messuage, exclusively of all other persons. The Plaintiff *Harris*

(1) 1 Wms. Saund. 321. (3) 11 A. & E. 759.
(2) 8 H. L. C. 348. (4) 2 B. & Ad. 164.

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occupied a summer-house which he had converted into a house, and into which he had thrown one room of the old house. It was held that he had a right in the pew in respect of his occupation of that one room. Lord *Tenterden* says (1): "The Plaintiff was the occupier of the summer-house and of one room which was part of the old dwelling-house. The faculty gave a right to the several persons who should be occupiers of the messuage to use the pew." And then Justice *Littledale* says: "I am of the same opinion. The Plaintiff having a right by the faculty to use the pew, the churchwardens had no right to interfere as they did, and were wrongdoers. It may certainly happen, in consequence of a house being subdivided, that three or four families may become entitled to use a pew belonging to the original messuage." There are the very words, "owners and occupiers." The same point in another shape came before the Court of Queen's Bench in *Codling* v. *Johnson* (2), where in trespass *quare clausum fregit* the Defendant prescribed in a *que* estate for a right of way over the *locus in quo*. It appeared that the Defendant's land had within fifty years been part of a large common, and afterwards inclosed under the provisions of an Act of Parliament, and allotted to the Defendant's ancestor, and it was held that notwithstanding this evidence the right claimed by the Defendant's plea might in law exist, and the jury having found that in fact it did exist, the Court refused to disturb the verdict. Justice *Bayley* there says: "It appears by the report that the jury were satisfied of the existence of this immemorial right of way. Suppose this land to have been part of the waste before the inclosure, then the lord might have the right for himself and his tenants to use the way, and then each person having an allotment under the inclosure would have the right of way." It seems to me, therefore, both on principle and authority, we must decide against the Appellant.

The next point made was this: It was said that the grant conferred a right to use the way only so long as the allotment was used for agricultural purposes. I cannot find any such restriction. The right is to the owners or owner for the time being of the lands. Now land, according to English law, includes everything on or under the soil; all buildings that you may erect on it; all

(1) 2 B. & Ad. 166. (2) 9 B. & C. 933, 934.

mines that you may sink under it. If an allottee builds a house, or, as it is said here, twenty-six houses on the land, the owner of each house, with the soil on which it stands, is an owner of part of the lands, and entitled to the benefit of the grant. Irrespectively of the technical meaning of the word "land," it could hardly be contended that on the occasion of an inclosure it was contemplated that at no time thereafter would any allottee erect on any part of these large allotments, which I see include old inclosures, any labourers' cottages, or any house or dwelling of any kind, or even a stable for his horses. I have no doubt, therefore, that the word "land" is used advisedly. This being so, it appears to me the right is a general right of way, a right of way to all the houses which may be built on the land in question.

Then it is said the provision that the allottees shall do as little damage as may be to the soil or the corn, grass, or herbage, prohibits what is now being done. That provision obviously is put in to shew that if the way was not fenced off the persons using it must only go from point to point in the shortest way, and not deviate over the field so as to damage the corn and grass more than necessary. It appears to me that these words by no means limit the right of the grantee to use the way for all reasonable purposes.

Then it was said, admitting the owner of each house to have a right of way, still the grantees have no right to enter upon the allotments over which the right of way is granted for the purpose of laying down a metalled road. Now it was conceded to be the principle of law that the grantee of a right of way has a right to enter upon the land of the grantor over which the way extends for the purpose of making the grant effective, that is, to enable him to exercise the right granted to him. That includes not only keeping the road in repair but the right of making a road. If you grant to me over a field a right of carriage-way to my house, I may enter upon your field and make over it a carriage-way sufficient to support the ordinary traffic of a carriage-way, otherwise the grant is of no use to me, because my carriage would sink up to the naves of the wheels in a week or two of wet weather. It cannot be contended that the word "repair" in such a case is limited to making good the defects in the original soil by subsi-

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dence or washing away, it must include the right of making the road such that it can be used for the purpose for which it is granted. Therefore I think the Defendants have a right to make an effective carriage-way going, as they are going, by the shortest route, and not interfering with the land to a greater extent in width than the width of the street pointed out by the deed itself.

The last point was this: It was said, "Assuming the Defendant has such a right, at all events he has not that right now, he has not yet completely built his house or houses; they are only in process of building, and he is preparing to make his road before it is wanted." As to that, it appears to me that we must look at the case in a reasonable way. If a man is building a house or houses, and he wants carts or carriages to go along the road, either to carry materials for the building, or with a view to the use of the inhabitants of the houses when built, it is not reasonable to say that he may not make his road till the house is completed and somebody is going to inhabit it. The reasonable thing is, that he may during the building do, by way of anticipation, that which he would, according to this argument, have the right to do the moment the house was completed. But there is an additional answer to that argument, that, assuming it to be sound, it would not justify an injunction. If a man is about completing a house, and would have the right to make a road to it as soon as it was completed, the intermediate damage occasioned by his making the road while the house is building must be of the most trifling description. It must be the loss for that short time of the grass which would grow over the road which was continually traversed by men, horses, and carriages. Such a case is certainly not one in which the Court will interfere by injunction. Nor was the case really put on that ground. For these reasons, it appears to me that the judgment of the Vice-Chancellor ought to be upheld.

James, L.J.

JAMES, L.J.:—

I am of the same opinion. As to what was read from the Vice-Chancellor's judgment about this not being an easement, I think there must be some mistake. It is an easement, and our judgment is based upon its being such. Those rights which the

Master of the Rolls has held to belong to the Defendants, in which I fully concur, belong to them as the owners of an easement in respect of the dominant tenement as against the owner of the servient tenement. As to forming a substantial carriage-road, I agree with the Master of the Rolls. The case is not, in my opinion, one-tenth part as strong or as difficult as *Dand* v. *Kingscote* (1), on which we are told the Vice-Chancellor proceeded.

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BAGGALLAY, J.A.:—I agree.

Baggallay, J.A.

Solicitors: *T. Crowdy & Son; J. Trotter.*

Ex parte CLOSE. *In re* BENNETT & GLAVE.

C. A. 1877 *March* 8.

Liquidation by Arrangement—Summoning Debtor for Examination—Default in giving Information to Trustee—Power of Trustee—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 96, 125—*Bankruptcy Rules*, 1870, *rr.* 171, 301.

If the trustee in a liquidation by arrangement is dissatisfied with the information given to him by the debtor as to his debts and assets, he is entitled to summon the debtor for examination before the Court, and is not bound, before he can proceed with the examination, to shew that the debtor has made default in giving him the information which he is entitled to require.

Sect. 96 of the *Bankruptcy Act*, 1869, applies to liquidation by arrangement as well as to bankruptcy.

Decision of *Bacon*, C.J., in *Ex parte Glave* (2) reversed.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

Statement.

In April, 1875, *J. E. Bennett* and *J. Glave*, cloth merchants at *Leeds*, filed a liquidation petition, under which *J. W. Close* was appointed trustee. In May, 1876, the trustee applied *ex parte* to the County Court, under sect. 96 of the *Bankruptcy Act*, 1869, for the issue of a summons against *Glave* to attend the Court on the 24th of May, to give evidence in the matter of the liquidation. The application was expressed to be made on the ground that *Glave* was suspected to have in his possession a quantity of cloth

(1) 6 M. & W. 174. (2) 3 Ch. D. 315.

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Statement.

of considerable value for which he had not accounted to the trustee, and to have received several sums of money on account of the firm on the day on which the liquidation petition was signed, for which he had not accounted to the trustee, and that *Glave* was capable of giving information respecting the debtors, their trade dealings and property. The summons was issued on the 9th of May, in the form No. 76 of the Bankruptcy Forms, 1870. *Glave* on the 24th of May filed an affidavit denying the truth of the allegations of the trustee. He attended the Court at the time appointed, and was sworn, but under the advice of his solicitor he refused to answer any questions. The ground of the refusal was that sect. 96 does not apply to liquidation, and that under rule 301 of the Bankruptcy Rules, 1870, the trustee was bound to shew, before the summons could be issued, that the debtor had made default in giving him information. The Judge, therefore, made an order committing *Glave* for contempt of Court, but directed that the order should not be enforced until after the 5th of July, so that *Glave* might have an opportunity of appealing. *Glave* appealed to the Chief Judge, who, on the 3rd of July, held that before the debtor could be summoned the trustee ought to shew that he had made default under rule 301, and his Lordship ordered that the hearing of the appeal should be adjourned, and that the matter should be referred back to the Judge of the County Court to determine whether *Glave* had made any default under rule 301. And it was ordered that the trustee should be at liberty to file affidavits shewing such default, and that *Glave* should be at liberty to file affidavits in opposition thereto and to the issuing of the summons, and that the issuing of the warrant of committal should be suspended until after the determination of the appeal (1). Affidavits were then filed by *Glave* and by the trustee, and the matter was heard again by the County Court Judge, and he, on the 4th of October, gave a certificate adjudging that the debtor had made default under rule 301, before the issuing of the summons. The appeal came on again to be heard by the Chief Judge on the 4th of December.

Winslow, Q.C., and *Wildey Wright*, for *Glave*.

(1) 3 Ch. D. 315.

Bagley, for the trustee.

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BACON, C.J., said that sect. 96 applies to liquidation as well as to bankruptcy, but held upon the evidence that there had been no default on the part of *Glave* in giving information to the trustee. His Lordship therefore discharged the order for committal, and directed the trustee to pay the costs of the proceedings subsequent to the 3rd of July.

The trustee appealed. The appeal was heard on the 8th of March, 1877.

C. A.

De Gex, Q.C., and *Bagley*, for the trustee:—

Argument.

By virtue of sect. 125, the power given by sect. 96 is made applicable to liquidation by arrangement. It would be very inconvenient if, before a summons can issue for the examination of the debtor, the Court must try the preliminary issue whether the debtor has made default in giving the trustee the information required by rule 301.

[They were stopped by the Court.]

Winslow, Q.C., and *Wildey Wright*, for *Glave*:—

Neither in liquidation nor in bankruptcy is the issuing of a summons under sect. 96 *ex debito justitiæ*. The trustee is bound to state in writing the grounds of his application for the summons: Rule 171. It is not like a *subpœna* for the attendance of a witness; it is an examination to inform the mind of the trustee and the Court. This power is a very anomalous one, and a *primâ facie* case for its exercise ought to be shewn: *Ex parte Alexander* (1). The debtor must have a right to say, in answer to the trustee's statement, I have *bonâ fide* given all the information in my power. He must have a right to tell the Court all that has taken place, and to ask its judgment whether he has made any default. Sect. 96 no doubt applies to liquidation by arrangement, but its operation is modified by rule 301. The issue of the summons is a matter as to which the Court has a discretion. Sect. 96 only says that the Court "may" issue the summons, and it is competent for a

(1) 1 D. J. & S. 311.

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Argument.

general rule to lay down the conditions on which the Court will exercise its discretion.

[JAMES, L.J.:—How can the Judge say, until he hears the questions, whether they are proper to be put?

MELLISH, L.J.:—When rule 301 says that the debtor "shall in default be liable to be summoned and examined before the Court," does it impose a condition precedent to the issuing of the summons, or does it not merely regulate the exercise of the discretion of the Judge?]

In the present case the trustee has made requisitions of the most inquisitorial nature upon the debtor. The trustee has been acting vexatiously throughout.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I am of opinion that the order of the Chief Judge must be discharged. With all deference to him, it appears to me that he has put the case upon an entirely false issue. He has considered it as if he were trying the conduct of the debtor, not whether the debtor could be asked for further information, but upon the materials contained in affidavits he has arrived at the conclusion that the debtor had fully accounted for his property. That really is not the mode in which the question was presented to the County Court Judge, nor the way in which the question ought to have been determined by the Chief Judge, or ought now to be determined by us. It appears now that the trustee, so far from not having asked for information before he applied for the summons, asked for information to an extent which is said to have been oppressive and vexatious. It is said that he asked for a great deal more information than he ought to have asked for, a great deal more than the bankrupt could be reasonably expected to give. That, to my mind, is wholly beside the question. The trustee thought that the information he had received was not sufficient and satisfactory. He thought probably that some of the answers were not true, that some of them might be evasive, and under those circumstances he applied for the debtor to come and be examined, that is, give evidence on oath, when he could be cross-examined, and documents could be put into his hands, and he could be tested as to the truth

of his evidence. It is said that the debtor put in an affidavit which the County Court Judge ought to have read, but which he did not read, and which shews that the summons was wrongly obtained. That affidavit really on its face discloses a very strong case for the examination, for it discloses the fact that there were missing bales of goods, some of which an accountant had been able to trace, and others of which the debtor said were not in his possession, and that is all he says. That is precisely the sort of thing upon which, as it appears to me, a trustee might very reasonably and properly desire that the debtor should be examined. Therefore he was summoned, and when summoned it appears to me that he was guilty of a plain contempt of Court in refusing to answer any question whatever which might be put to him in the presence of the County Court Judge.

I think, therefore, that the original order of the County Court Judge was right, and that it ought not to have been interfered with in the way in which it was by the Chief Judge when he sent the case back for further information. I think the further information has been used, as I have already said, for the purpose of trying a false issue, because it could not have been available for the purpose of saying whether the man ought to have been examined or cross-examined in order to obtain further information. I should be very loth indeed to limit the discretion of the County Court Judge as to the examination of a debtor. If he is fit to do his work he is fit to be trusted to stop any vexatious or oppressive abuse of the process of the Court, if the conduct of the trustee in seeking the examination does really amount to oppression or vexation. I think the County Court Judge could take no other course but say, You must answer the question, and if you do not I must send you to prison for contempt. No doubt the debtor will now submit to be examined, and then the County Court Judge will not enforce the order for committal.

MELLISH, L.J.:—

I am of the same opinion. In this case a summons was issued under sect. 96 to examine a liquidating debtor. The summons was in the ordinary form, and the application for it properly stated the ground on which it was sought to examine the debtor. Mr.

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Winslow has admitted, what I think is quite clear, that the 96th section applies to the case of a liquidating debtor as well as to the case of a bankrupt. The examination was begun, and a question was put to him. What the first question actually was I do not know, but he said, "I will not answer any question," and the County Court Judge held that to be a contempt, and ordered him to be committed. The question is, was he or was he not guilty of contempt in saying, I will not answer any question at all?

Now at first I was under the impression that the question to be decided was whether the trustee ought not to have examined the debtor in private previously to summoning him under the 96th section. If that had been the question (although even then I do not think that the 301st rule makes a previous examination in private a condition precedent to the issuing of a summons), yet I think the 301st rule and other rules do shew that in ordinary cases it is the duty of a trustee to apply for information to the bankrupt or debtor privately before he proceeds to put the estate to the expense and the debtor to the annoyance of examining him in public. But if the trustee has used all reasonable endeavours to obtain the information privately, and is not satisfied with the answers which he gets, then, in my opinion, he is unquestionably entitled to have the debtor examined under the 96th section. But it is said, and that is the question we have to determine, that if the trustee has applied to the debtor, either by written requisition or by verbal questions (for I do not know that he is obliged to proceed by written requisition unless he pleases), for information, and is not satisfied with the answers which he gets, there is to be a preliminary contest upon affidavit whether he ought to have been satisfied. In my opinion nothing could be more inexpedient than to lay down that there must be a preliminary inquiry of that kind, because it is quite obvious that the trustee might not be satisfied with the demeanour of the debtor, and with the way in which he answered, and might think that he was shuffling, and that if he were examined in Court upon oath he would be able to get further information from him. Is it possible that upon affidavits, without examining the debtor at all, the Court can come to a conclusion whether he has or has not satisfactorily answered? Though rule 301 uses the words "in default," I do not

think that means that the Court is to try whether there has been a default or not. I think all it means is, that the trustee is to use due endeavours to get the information privately before he proceeds to summon the debtor under the 96th section. But, if the trustee has used due endeavours to get the information, and is not satisfied with the information which he has got, then I think the Court must trust to him, and must proceed to examine the debtor. Then, no doubt, if the debtor answers the questions put to him and refers to answers which he has already given to the trustee's written or verbal requisitions, and says, Those answers were quite sufficient and ought to have been taken as sufficient, and I swear that they are quite true, I think it is within the discretion of the County Court Judge to say whether he has not already answered everything that he ought. No doubt he might censure the trustee, or make an order against him for costs, if he came ultimately to the conclusion that it was unnecessary to have summoned the debtor. But the question we have to decide is, whether the debtor can by way of preliminary objection say, I will not answer a single question until the Court has gone into a lengthy inquiry as to what took place in private between me and the trustee, for the purpose of determining whether the trustee ought to have been satisfied with the answers which I gave him in private. I apprehend that that is not the proper course, and that there is no sufficient ground for the debtor's refusing to answer.

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I think, therefore, that the debtor was guilty of contempt in saying he would not answer any question at all.

BAGGALLAY, J.A.:—

Baggallay, J.A.

I am of the same opinion. It has been contended on the part of the Respondent that the effect of the 301st rule is to limit or modify the generality of the 96th section of the Act and of the 171st rule for giving effect to it. Now it would be very strange if there should be a more arbitrary power of summoning and examining persons other than the debtor than of examining the debtor himself, and that you should put impediments in the way of the examination of the debtor before the Court when you do not put them in the way of the examination of any one else. But I do not so read the 301st rule. I quite agree that you must read

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the 301st rule together with the clauses of the Act; the 78th section of the Act is, I think, clear on that point. But it appears to me the effect of the 301st rule is simply this: It is one of a series of rules which have reference to liquidation and composition, and it says that the fact of a special resolution having been passed shall be conclusive evidence that the debtor has complied with the provisions of the Act as regards the statement of his affairs which is required to be made by him at the meeting of his creditors, and then it goes on to qualify that to this extent, that, though it is to be deemed a sufficient statement of his debts and assets for the purpose of that meeting, yet he shall at all times be liable to give information to the trustee, and if he does not give information he is to be summoned before the Court for examination. That appears to me to be rather a provision in aid of sect. 96 than one which in any way limits its effect. Then, under the 96th section there is power to summon the debtor before the Court for examination, and, if it would have been open to him to shew cause why he should not be examined at all, he certainly has in the present case failed to do so, for the very affidavit which he has filed in support of his application to dismiss the summons shews on the face of it that there are questions in respect of which the trustee and the Court might properly consider that there ought to be further examination. It appears to me, therefore, that the decision of the County Court Judge in the first instance was quite correct.

Solicitors for Trustee: *Torr & Co.*, agents for *B. C. Pullan, Leeds.*

Solicitor for Debtor: *T. Noton.*

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V.-C. M.
June 14.
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March 26.

[1874 J. 14.]

Forest of Dean—Free Miners—Death—Gales—Priority of Application—Forfeiture—Surrender—Three Gales—1 & 2 *Vict. c.* 43, *ss.* 23, 38, 60, 61, *and* 24 & 25 *Vict. c.* 40.

Under 1 & 2 Vict. c. 43, ss. 23, 38, gales can be granted only to free miners of the *Forest of Dean;* therefore where a free miner dies after an application for a gale, but before the gale has been actually granted:—

Held (reversing the decision of *Malins*, V.C.), that the gale cannot be granted to his devisees not being free miners.

Per Malins, V.C.: Where several persons have applied for a grant of the same gale, and a grant has been made to one, the rights of all the other applicants are extinguished; and on the forfeiture of the gale the first applicant after the forfeiture, and not the next on the list of the former applicants, is, under sect. 60, entitled to the gale.

Per Malins, V.C.: A free miner can, under 1 & 2 Vict. c. 43, s. 61, hold only three gales; but where a free miner has had three gales, and has surrendered one of them on the ground that it contained an insufficient amount of coal to be profitably worked, he having a right to surrender exhausted gales, the surrender is valid, and the free miner is no longer the holder of three gales, so that he can apply to have another gale granted to him.

Statement.

THE rights of the free miners of the *Forest of Dean* are now regulated by the Acts 1 & 2 Vict. c. 43, and 24 & 25 Vict. c. 40, which provide for the appointment of a gaveller and a deputy-gaveller, who are to grant gales of mines to the free miners on application by the free miners. The free miners are to be registered, and are all male persons born and abiding within the hundred of *St. Briavels* of the age of twenty-one years and upwards, who should have worked a year and a day in a coal or iron mine within the hundred.

James Davis, a free miner, on the 4th of November, 1868, lodged with the deputy-gaveller an application for a gale at *Yorkley*, in the *Forest of Dean*. One *William Ellway* made an objection to the grant, and nothing further appeared to have been done in the matter until the 2nd of August, 1872, when two other free miners, *Adams* and *Jordan*, made an objection to the grant, and claimed the gale on the ground that one *John Beddis* had, in 1844, applied

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for a grant of a gale of these mines, which had, on the 7th of January, 1856, been granted to him; that this gale was, in 1868, forfeited under the provisions of the Acts, and that, therefore, a gale ought to be granted to *Adams* and *Jordan* under an application made by them in 1846. *Davis* thereupon filed a bill, in a suit called *Davis* v. *Howard*, against the gaveller, the deputy-gaveller, *Adams*, *Jordan*, and the Attorney-General, to restrain the grant of the gale to *Adams* and *Jordan*. To this bill the gaveller and deputy-gaveller demurred, and the demurrer was allowed on the 14th of November, 1872.

A further objection to *Davis's* grant was raised, that under sect. 61 no free miner could hold more than three gales, and that *Davis* was already the holder of three gales. As to this it appeared that *Davis* had been the holder of a third gale, called the *Speedwell Mine*, which had become so far worked out as to be unprofitable, and it was therefore surrendered to the deputy-gaveller, who accepted the surrender, the free miners having power to surrender exhausted gales. One *John Ellway*, who had also applied, on the 20th of July, 1871, for a gale of the *Yorkley* mine, disputed the validity of this surrender on the ground that a mine was not necessarily exhausted because it had become unprofitable; but the Court held, in *Ellway* v. *Davis* (1), that the *Speedwell Mine* was properly surrendered, and that therefore *Davis* was not the holder of three gales.

In consequence of these objections and of the litigation, the granting of the gale was postponed, and on the 19th of November, 1873, *Davis* died, having by his will devised to *A. James* and *T. Morse* all his interest in the gale.

James and *Morse* then presented a petition of right, asking for a grant of the gale. A demurrer was filed on behalf of the Queen, on the ground that the suppliants were not free miners, which demurrer was overruled; as reported (2).

The three suits, *Davis* v. *Howard*, *Davis* v. *Adams*, and *James* v. *The Queen*, came on for hearing before the Vice-Chancellor *Malins* on the 14th of June, 1876, when all the questions were again raised.

(1) Law Rep. 16 Eq. 294. (2) Law Rep. 17 Eq. 502.

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Higgins, Q.C., and *J. G. Wood*, for the devisees of *Davis*:— Argument.

It has been established that *Davis* had a clear right to this gale under sect. 23 of 1 & 2 Vict. c. 43, and his devisees ought not to lose anything because the deputy-gaveller was deterred by the notices and the litigation from granting the gale during *Davis's* lifetime. If the devisees had been free miners there could be no question about it: *In re Brain* (1).

Glasse, Q.C., and *W. W. Karslake*, for the Crown:—

None but free miners can have gales, and if an applicant dies before the grant, the Crown has no right to grant a gale to his devisees, not being free miners. The 56th section assumes that none but a free miner can have a gale granted to him.

Renshaw, for *Adams* and *Jordan*:—

We applied in 1846, no doubt, after *Beddis*, but if there is more than one application for a gale the deputy-gaveller ought to keep a list, and if a previous application fails, or the grant has been forfeited, the next on the list ought to have the gale.

Cozens-Hardy, for *John Ellway*:—

Davis had three gales, and therefore he could not take a fourth. It is not true that one gale was forfeited; no doubt it had been surrendered, but the surrender would not be valid unless the gale had been exhausted, and that has not been proved.

Judgment, V.-C. M.

MALINS, V.C., after referring to the facts of the case and the statutes, said that considering the question as if *Davis* had been now alive and had been an applicant in 1848, then it would be between him and *Adams* and *Jordan*, as *John Ellway* did not apply until 1871. The deputy-gaveller had taken a very reasonable view of the case, that when there were several applicants, and a grant had been made to one, all the others were considered as out of the way. *Beddis's* grant came to an end by his forfeiture in 1868, and it would be very inconvenient to treat the application of *Adams* and *Jordan* as one subsisting after that grant, which in fact was, under 24 & 25 Vict. c. 40, a grant of the fee simple of the

(1) Law Rep. 18 Eq. 389.

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gale, leaving nothing in the Crown but a right of re-entry for forfeiture. It was admitted that *Davis* was the first applicant after the forfeiture, and there was no obstacle to the grant to him.

As to *John Ellway's* claim on the ground that *Davis* had three gales and could not take a fourth, his Honour had in *Ellway* v. *Davis* (1) decided that he was not the holder of three gales, and was therefore not disqualified from taking a gale, and his Honour adhered to that decision.

His Lordship then continued:—

Having, therefore, on these grounds disposed of *Adams* and *Jordan*, and also of *John Ellway*, as between *Davis* and the Crown, if *Davis* were now alive, he would stand as the only applicant, and be entitled to the grant. But, on behalf of the Crown, it is contended, not now for the first time, but also on the demurrer in *James* v. *The Queen* (2), that the grant can only be made to a free miner. *Davis*, a free miner, died on the 19th of November, 1873, and has devised to trustees who are not free miners; and the prayer of the present petition is that the gale should be granted to persons who are not free miners. Now this case came before me, and was argued very elaborately on the demurrer, when my reasons were very fully stated for coming to the conclusion which I did; and I must say that, having looked at the case, and at those reasons, I entirely adhere to the decision. It appears to me now, as it did then, that when a free miner does all that within him lies, namely, makes an application, and that application has been acceded to, and having then proceeded to endeavour to have his title perfected, he does all that is requisite. The deputy-gaveller acceded to the application, and took the necessary steps to perfect it, and did what it was a part of his duty to do, namely, laid out the boundaries of what the gale was to be. [His Lordship then read a notice issued by the deputy-gaveller, and continued:—] Nothing then remained but the formal act of making the grant. Now that was proposed to be done by the gaveller on the 2nd of August, 1872, and it was owing to no default of *Davis* that it was not done. The disputes caused by *Adams* and *Jordan* and *John Ellway* led to all these difficulties,

(1) Law Rep. 16 Eq. 294. (2) Law Rep. 17 Eq 502.

and occasioned the postponement of the grant of this gale from the 2nd of August, 1872, when the gaveller would have perfected it, to the present day. It is admitted on all hands that if, on the 2nd of August, 1872, when this duty was imposed on the gaveller, the grant had been made to *James Davis*, the title would have been perfect. The Act of Parliament makes it positive that, if he had obtained the grant on that day, he might forthwith have sold the gale to any person whatever. [His Lordship then read the 23rd section of 1 & 2 Vict. c. 43, and continued:—] The day after the gale is actually granted, the Crown of course must deal with other persons than free miners, namely, anybody to whom the grantee thinks fit to sell or devise. Now it has been argued that the only other thing of any importance on the question is the 56th section of the Act, and that it was not cited before me on the former occasion. It is true that it does not appear either by my notes or by the report to have been read upon that occasion. But the question is whether it makes any difference. That section provides that in every grant of a gale the metes, bounds, limits, and extent of such gale, and the galeage rent, royalty, or tonnage duty to be paid to Her Majesty, shall be specified in the grant thereof. It further provides that if any free miner claiming to be entitled to a gale shall not agree with the gaveller or deputy-gaveller as to the amount of such galeage rent, royalty, or tonnage duty to be paid for the same and to be specified in the grant thereof, then it shall be referred to an arbitrator to determine the galeage rent, royalty, or tonnage duty which ought to be paid. I take it that what will be done is this: The gaveller, having already settled the boundaries, will now fix the amount of the rent to be paid, and the conditions of the lease, which, I presume, will be precisely the same to *Davis's* devisees as they would have been to *Davis* himself. If either party is dissatisfied, *Davis's* devisees, by the petition of right, have offered to submit the whole thing. It appears to me, therefore, that the words "free miner" in section 56 merely mean the Crown on one side and the free miner or the grantee on the other, who may be either the free miner or the grantee himself, or persons claiming lawfully under him.

On the whole case, therefore, it appears to me that *Davis's*

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devisees have made out most clearly their title to have the grant of this gale perfected to them, and the order will, in pursuance of the prayer of the petition, be that the gale may be granted to them.

C. A.

From this order the Crown appealed. The appeal was heard on the 26th of March, 1877.

Sir *J. Holker*, A.G., *Glasse*, Q.C., and *W. W. Karslake*, for the Crown, represented by the Commissioners of Woods, Forests, and Land Revenues.

Higgins, Q.C., and *J. G. Wood*, for the devisees of *Davis*.

Cozens-Hardy, for *John Ellway*.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

With all respect for the judgment of the Vice-Chancellor, and also with a full sense of what may be called the hardship upon the Respondents, I have come to the conclusion that the order of the Vice-Chancellor cannot be affirmed.

There is really no question of what may be called justice or injustice. There is no question of contract. There is no question of equity of any kind. The rights are ancient legal rights which existed more or less imperfectly in the old class of free miners from, I believe, the time of the Romans, and were afterwards settled, and to a certain extent codified; the Acts of 1 & 2 Vict. c. 43, and 24 & 25 Vict. c. 40, establishing the rights of the free miners as between themselves, and as between themselves and the Crown. It was then established that nobody but a registered free miner had a right to a gale, that there should be a register of the free miners, and that whenever there was a gale required to be granted, the first of the free miners who made application for it should have the gale granted to him. The sole merit and the sole consideration and price which he has paid for the grant is that he is the first man who has run to the office to ask for it. He has given no consideration to the Crown, and no consideration to the public whatever, but he is entitled to have whatever the Act

of Parliament says he is to have as the consequence of the first application. Then the Act of Parliament provides that when the gale has been so granted to him it shall be descendable as his real estate, and shall be capable of being assigned by him. That is all, and there is nothing to give him any estate or interest, legal or equitable, in the matter before the grant of the gale. The whole of the provisions of the Act of Parliament are inconsistent with the notion of his having any right whatever to touch the property or to do anything till the gale is granted to him. If he dies before the gale is granted to him, that is a misfortune which may occur to any person. As under the Act he got the right by being the first to run to the office and ask for the gale, so he lost the right by dying before the grant was made to him, and any other free miner would be let in. Would the devisees of a man who died the day after he made the application be entitled, or would they be entitled if he died after the advertisement, or after the rent had been fixed? When is the right to be acquired as an equitable right, and can any right be acquired before the actual sealing of the grant by which the Crown is authorized to create the estate? It was not seriously contended that, unless there had been some default in some officer or other, there would be anything in the nature of the equity which is suggested, but it was said that there had been some delay and some misconduct on the part of the officers of the Crown. It appears to me that the officers of the Crown could hardly have done otherwise under the circumstances; and probably the accident has mainly arisen from the fact that the applicant, who was the predecessor in title of the present suppliants, allowed an interval to elapse from 1868 to 1872 after making his application. That might, however, be ground of complaint against the officer, or there might have been an application for a mandamus; but those considerations cannot enable us to enlarge the Act of Parliament, or enable us to give an equitable right where the Act has merely given a legal right, in favour of a person who has nothing but a mere statutory right. The Act of Parliament must be taken as it stands, in favour of each free miner who has made an application, and in favour of the other free miners if an accident deprives the first applicant of the power of obtaining the gale.

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I am of opinion, therefore, that the order of the Vice-Chancellor should be discharged.

MELLISH, L.J.:—

I am of the same opinion. There are two questions: first, whether, according to the true construction of the Act of Parliament, there is a legal right in the heir or devisee of a free miner who has made the first application to obtain the grant; and, secondly, if there is no such legal right, whether there are any equitable considerations upon which the Court can give equitable relief, although there is no legal relief?

Now, with respect to the first question, if a Court of law had to construe this Act of Parliament upon an application for a mandamus, they must clearly come to the conclusion that nobody except the free miner who has made the first application could obtain a mandamus. [His Lordship then read the 23rd and the 60th sections of the Act]. It seems that, with the exception that the gaveller is not to grant a gale to a man who has already got three gales, and is not to grant a gale which will interfere with previous gales, he is to grant a gale to any free miner who makes the first application. But my opinion is that if a free miner dies after applying for a gale, then the first free miner who makes an application has the right to a grant of the gale, and the estate of the man who dies is deprived of a right which the Act of Parliament had given, the heir or devisee not being recognised in the Act. The Act says that the grant is to be made to a free miner, and therefore a person who is not a free miner, but only the heir or devisee of a free miner, has no *locus standi* to compel the gaveller to make a grant.

That being so, are there any equitable considerations on which the Court can say that equitable relief must be granted? If there was anything in the nature of contract, possibly the equitable doctrine would apply, that where a contract is made the Court considers that what is agreed to be done is to be treated as if it was done. But there is no contract between the Crown and the free miner, for the simple reason that there is nothing in the Act to compel a free miner to accept the grant after he has made his application for a grant. As far as I can see, at any time before

the grant is actually made he can withdraw his application, and not insist upon it. The free miner is not bound by it, and it is contrary to the nature of contract to say that if one party is not bound the other party can be bound. Therefore the obligation on the Crown is not by way of contract, but it is a simple duty on the gaveller imposed by Act of Parliament, and there is no ground upon which, on equitable considerations, that right can be extended beyond its legal limit. On any other construction, and if death does not put an end to it, no one can tell how long an application may continue in legal force.

Judgment, C. A. Mellish, L.J.

I am of opinion, therefore, that, upon the true construction of the Act, in order to obtain a grant, the applicant must continue to be alive, and be a free miner at the time of the grant.

BAGGALLAY, J.A.:—

Baggallay, J.A.

It appears to me that the single question involved in this appeal is, whether, at the time when the suppliants presented their petition of right, the gaveller or deputy-gaveller had any power or authority to grant them the gale in question, and whether that question is to be answered in the affirmative or the negative must be decided upon the terms of the two Acts of Parliament. The duties of the gaveller and deputy-gaveller are ministerial only, and they are not to act according to what they may think right or just in particular cases, but to obey the provisions of the Act of Parliament. [His Lordship then referred to the 14th, 21st, 23rd, 50th, 57th, and 60th sections.]

Now, from the beginning to the end of this Act there is no provision for the grant of the gale to any other person than to a free miner. We have heard an ingenious argument on the 38th and 39th sections, that the Act of Parliament draws a distinction between the actual grant of a gale and the right to have a gale, but it is perfectly clear that those sections deal merely with a particular state of circumstances at the time when the Act passed, when there had been for some time a general suspension of grants of gales.

This appeal has been properly brought, and the order must be discharged.

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JAMES, L.J.:—

We discharge the order of the Court below, and give no costs either in the Court below or here. It was worth while for the Crown to have our decision on this point.

Solicitors for *James* and *Morse*: *Peacock & Goddard.*

Solicitor for Commissioners of Woods, Forests, and Land Revenues: *H. Watson.*

Solicitors for *John Ellway*: *Waterhouse & Winterbotham.*

PICKERSGILL *v.* RODGER.

M. R.
1876
Nov. 27.

[1875 P. 25a.]

Trust Deeds — Appointments — Power of Revocation — Will — Election — Compensation — Child Devisee predeceasing Testatrix — Charging Compensation on Devised Estate — Wills Act (1 *Vict. c.* 26), *s.* 33.

17 Ch D 117
19 Ch D 613-4

By a deed, dated in 1848, a firm who had received advances from *S.*, a married woman, out of her separate estate, covenanted with trustees for payment to them of all moneys then advanced and to be advanced by *S.*, to the extent of £15,000 in the whole; such moneys being settled upon trust for such persons as *S.* should by deed or will appoint; and in default of appointment, for her separate use for life.

By a deed, dated in 1851, *S.* appointed the trust funds, after the deaths of herself and her husband, to her two sons, *W.* and *J.*, and her two daughters, *R.* and *H.*, in equal fourths, the daughters' shares being settled upon themselves for life, with remainder to their "children." The deed contained no power of revocation.

By another deed, dated in 1863, *S.* purported to revoke that appointment and to re-appoint the £15,000—together with a further sum of £20,000 thereby settled, and representing further advances to the firm—after the deaths of herself and her husband, among her said sons and daughters, the daughters' shares being settled upon themselves for life, with remainder to their "children." This deed also contained no power of revocation.

S.'s husband died in 1865, and subsequently, by two further deeds of appointment, neither of which contained any power of revocation, *S.* purported partially to vary the appointments made by the deed of 1863.

By her will, dated in 1867, *S.* purported to revoke all the appointments, and gave all her real estate to her son *J.* in fee, subject to the payment thereout of a sum of £10,000 to her son *W.*: and she gave "all money standing to her credit or to the credit of any trustees on her behalf in the books of the said firm, and all her *L. & N. W. Railway* stock, and all other the residue of her personal estate of which she should be possessed at her death, or over which she had or should have any power of disposition by will," in trust for her two daughters *R.* and *H.* in equal shares, such shares being settled upon themselves for life, with remainder to their "issue."

At the date of her will *S.* had a considerable balance standing to her credit in the books of the firm (which in 1870 was wound up), and she had also then standing in her name a sum of £10,000 *L. & N. W. Railway* stock representing moneys formerly advanced by her to the firm.

S. died in 1874, possessed of real estate in *Yorkshire*, exceeding in value the share appointed to *J.* by the deed of 1851, and to personal estate beyond the £35,000 settled by the deeds of 1848 and 1863, but she had no *L. & N. W. Railway* stock beyond that above mentioned.

J. died in 1873, before his mother, having by his will devised all real

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estate in *Yorkshire* to which he should be entitled at his death to his eldest son in fee; and he bequeathed all his residuary personal estate to his executors, upon trusts therein mentioned.

Upon *S.'s* death *J.s* eldest son and devisee paid *W.* the £10,000 bequeathed to him by her will.

In an action instituted for the purpose of having the rights of the different parties claiming under the deeds and under *S.'s* will ascertained and declared:—

Held, first, that *S.* having by her will shewn a clear intention to dispose of the property comprised in the appointments, the various persons claiming under her will were put to their election as between the benefits conferred on them by the deeds and the benefits conferred on them by the will; and, secondly, that, under sect. 33 of the *Wills Act*, *J.'s* estate was in the same position, *quoad* the will of *S.*, as if he had survived her; and that, consequently, as between his estate and her disappointed legatees, the latter were entitled to put his estate to election, or, in other words, to require his estate to make good the benefits intended for them by the will; but that no case of election arose as against his residuary legatees, and the liability to make good the one-fourth of the £15,000 taken by his residuary legatees was charged exclusively upon the *Yorkshire* estates in the hands of *J.'s* devisee.

The Court, however, declined at present to decide the rights of the parties under the deed of 1863, so as not to prejudice the future claims of the children of *S.'s* two daughters, who, with their children, were parties to the action.

The doctrine of election or compensation explained.

Statement.

BY an indenture dated the 6th of April, 1848, and made between *John Pickersgill* and his son *John Cunliffe Pickersgill* of the first part, *Sophia Pickersgill*, the wife of the said *John Pickersgill*, of the second part, and *Thomas Fielden* and the Plaintiff, *William Cunliffe Pickersgill*, of the third part; after reciting (as the facts were) that certain hereditaments then stood limited to such uses as the said *Sophia Pickersgill* should by deed or will appoint, and, in default of appointment, upon trust for her separate use during the joint lives of herself and her said husband, with remainder to the use of herself in fee; and that under the will of her mother the said *Sophia Pickersgill* was entitled to the income of certain personal estate during her life for her separate use; and that the said *Sophia Pickersgill* had advanced considerable sums of money, amounting to the sum of £6300, out of the rents and profits of the said hereditaments and the income of the said personal estate to the firm of "*John Pickersgill & Son*," in which her said husband and son, *John Pickersgill* and *John Cunliffe Pickersgill*, were partners; it was witnessed that the said *John Pickersgill* and *John*

Cunliffe Pickersgill covenanted with the said *T. Fielden* and the Plaintiff, *W. C. Pickersgill*, for payment to them of the said sum of £6300, and such further sums as the said *Sophia Pickersgill* should from time to time advance to the firm, together with interest at 5 per cent. per annum. And it was thereby declared that the said *T. Fielden* and the Plaintiff should invest the said £6300 and further advances in manner therein mentioned, and should stand possessed of the trust moneys and investments and the income thereof, upon trust for such persons as the said *Sophia Pickersgill* should by any deed or deeds with or without power of revocation and new appointment, or by will, appoint; and, in default of appointment, to pay the income of the trust premises to her for her separate use, and after her death to hold the trust premises, and the income thereof, upon the trusts therein mentioned. And it was provided that the entire amount of the principal moneys thereby secured and settled should be limited to £15,000.

By a deed-poll of the 22nd of July, 1851, Mrs. *Pickersgill*, in exercise of her power, appointed that the trustees of the last-stated indenture should, after the deaths of herself and her said husband, *John Pickersgill*, stand possessed of the trust funds which might then be subject to the trusts of the said indenture, upon trust for her two sons, the Plaintiff, *William Cunliffe Pickersgill*, and *John Cunliffe Pickersgill*, and her two daughters, the Defendant *Sophia Rodger* (wife of the Defendant *Robert Rodger*), and the Defendant *Harriet Eliza Shepherd* (wife of the Defendant *Henry Shepherd*) in equal fourths, the daughters' shares being settled upon themselves for life, with remainder to their "children," as therein mentioned. This deed contained no power of revocation.

In 1863 Mrs. *Picksergill's* advances to the firm had exceeded the £15,000 settled by the deed of 1848, and by an indenture dated the 16th of July, 1863, and made between the said *John Pickersgill* and *John Cunliffe Pickersgill* of the first part, the said *Sophia Pickersgill* of the second part, and the said *T. Fielden* and the Plaintiff of the third part, Mrs. *Pickersgill* purported to revoke the appointment made by the deed-poll of 1851, and after directing the said trustees to stand possessed of the said £15,000,

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and also of the amount of the other and future advances to the extent, in the whole, of £20,000 more, upon trust for such persons as she should by deed or will appoint, she appointed the whole of the trust funds comprised in the deed of 1848 and the present deed, after the deaths of herself and her husband, among her said sons and daughters, the daughters' shares being settled upon themselves for life, with remainder to their "children." This deed contained no power of revocation.

John Pickersgill died on the 11th of November, 1865.

By deeds-poll of the 11th of December, 1865, and the 29th of October, 1866, Mrs. *Pickersgill* made further appointments purporting to vary the appointments made by the deed of 1863, but neither of these deeds-poll contained any power of revocation.

On the 21st of March, 1867, Mrs. *Pickersgill* made her will, and thereby, after appointing her son, the Plaintiff, *W. C. Pickersgill*, and the Defendant *Henry Shepherd*, her executors, and stating that it was her desire and intention to dispose by that her will of all property, both real and personal, of or to which at her decease she might be possessed or entitled, or over which she might have any power of appointment or disposal, she revoked every deed of appointment executed by her theretofore, so far as the same was intended to take effect from and after her decease, and by virtue of every power enabling her in that behalf she thereby appointed that every such deed of appointment should, so far as aforesaid, be inoperative and of none effect. And she devised, and also, in exercise of any power enabling her in that behalf, appointed, all real estate belonging to her or subject to her appointment unto her said son, *J. C. Pickersgill*, his heirs and assigns, subject, nevertheless, to the payment thereout of the sum of £10,000 to her said son, the Plaintiff *W. C. Pickersgill*. And after bequeathing various pecuniary legacies, the testatrix thereby gave and appointed all money standing to her credit or to the credit of any trustees or trustee on her behalf in the books of the said firm of *John Pickersgill & Son*, or in the books of the said *J. C. Pickersgill*, the surviving partner of that firm, and all her *London and North Western Railway* Perpetual Five per Cent. Preference Stock, and all other the residue of her personal estate whatsoever and wheresoever, of which she should be possessed at her death, or over

which she had or should have any power of disposition by will (such money, stock, and residue being thereinafter described as her residuary personal estate), unto the said *W. C. Pickersgill* and *H. Shepherd*, their executors, administrators, and assigns, upon trust for sale and investment of the proceeds as therein mentioned, and to stand possessed of her residuary personal estate and the securities from time to time representing the same upon trust for her said two daughters, *Sophia Rodger* and *Harriet Eliza Shepherd*, in equal shares, such shares being settled upon themselves for life, with remainder to their "children or remoter issue," as therein mentioned.

At the date of her will Mrs. *Pickersgill* had a considerable balance standing to her credit in the books of the firm of "*John Pickersgill & Son*," which in 1870 was wound up, and she had also then standing in her name a sum of £10,000 *London and North Western Railway* Perpetual Five per Cent. Preference Stock, representing moneys formerly advanced by her to the firm and so invested by her direction.

In 1867 *J. C. Pickersgill* assumed the additional surname of *Cunliffe*, and by his will, dated the 27th of June, 1867, devised all the freehold and leasehold estates in the county of *York* of or to which he should be seised or entitled at the time of his decease unto his eldest son who should be living at his decease absolutely; and he bequeathed all his residuary personal estate to his executors, the Defendant *Helen Pickersgill Cunliffe* and his brother, the Plaintiff, *W. C. Pickersgill*, upon the trusts therein mentioned.

The testator, *J. C. Pickersgill Cunliffe*, died on the 6th of October, 1873, in the lifetime of his mother, leaving the Defendant *John Cunliffe Pickersgill Cunliffe*, his eldest son, and other children, him surviving.

Thomas Fielden, one of the trustees of the settlements of 1848 and 1863, died in December, 1869, leaving his co-trustee, the Plaintiff, him surviving.

Mrs. *Pickersgill* died on the 20th of December, 1874, and her will was duly proved by her executors, the Plaintiff *W. C. Pickersgill* and the Defendant *Henry Shepherd*. At the time of her death she was possessed of or entitled to freehold estates in the county of *York* far exceeding in value the share appointed by her to her

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son *J. C. Pickersgill Cunliffe* by the deed of 1851; also of personal estate beyond the £35,000 settled by the deeds of 1848 and 1863; but she was not entitled to any *London and North Western Railway* stock beyond the £10,000 stock above mentioned.

Shortly after Mrs. *Pickersgill's* death, the Defendant *J. C. Pickersgill Cunliffe*, as his father's devisee, paid the Plaintiff, *W. C. Pickersgill*, the £10,000 charged in his favour by Mrs. *Pickersgill's* will upon her real estate.

Mrs. *Pickersgill's* daughter, Mrs. *Rodger*, had two children, who had both attained twenty-one, and the other daughter, Mrs. *Shepherd*, had one child, who was an infant. All these children were made Defendants.

This action was instituted for the execution of the trusts of the two settlements of 1848 and 1863 respectively, as affected by the subsequent deeds of appointment; for the execution of the trusts of Mrs. *Pickersgill's* will, and for declarations as to the rights of the different parties claiming under the several trusts.

The action now came on upon motion for judgment, the principal questions being, first, generally, what interests Mrs. *Pickersgill's* children took under the deeds and under her will, and how far they were bound to elect between their interests under the deeds and their interests under the will; and secondly, in particular, whether any case of election arose as to the children of *J. C. Pickersgill Cunliffe*, Mrs. *Pickersgill's* son who died in her lifetime, and if so, whether the Defendant *J. C. Pickersgill Cunliffe*, as the devisee of that son's real estate, had a right to have the compensation to be made to Mrs. *Pickersgill's* disappointed residuary legatees paid out of his father's personal estate, or whether the real estate passed to him charged with the burden of such compensation.

Argument.

Fry, Q.C., *Davey*, Q.C., and *Romer*, for the Plaintiff:—

According to *Maxwell* v. *Maxwell* (1), and that class of cases, the question of election does not arise unless there is strong evidence to shew that the testator intends to give away property which does not belong to him.

If it should be held that the Plaintiff is bound to elect between

(1) 2 D. M. & G. 705.

his interests under the deeds and the legacy of £10,000 given him by Mrs. *Pickersgill's* will, then he elects to take the latter, which he has in fact already received.

Cookson, Q.C., and *Rodwell*, for the Defendant *J. C. Pickersgill Cunliffe*:—

This Defendant claims the *Yorkshire* estates either as heir-at-law or as devisee of his father, for, under the 33rd section of the *Wills Act* (1 Vict. c. 26) the devise of those estates to the father by Mrs. *Pickersgill's* will did not lapse through his death in her lifetime, but took effect as if he were living at her death. That being so, the father, if he had been living at Mrs. *Pickersgill's* death, would have been put to his election as between the £3750 (one fourth of the £15,000) appointed to him by the deed of 1851 and the *Yorkshire* estates, since the will purported to revoke that appointment. As it would have been to his interest to elect to take the estates, he would have so elected, and consequently the law would have imposed upon him the obligation of giving up the £3750; that is to say, of compensating the disappointed legatees out of that very fund.

The result therefore is, as we submit, that that obligation was fastened exclusively upon the father's personal estate, which is diminished to that extent. This obligation was, in fact, a debt due from his personal estate, and created no charge on his real estate: *Earl of Darlington* v. *Pulteney* (1).

[JESSEL, M.R.:—That was a case arising on a condition of forfeiture, not upon the question of compensation.]

Compensation is merely the forfeiture of part of an interest: the general principle is the same. If, as we contend, the liability to make compensation which the father of this Defendant was under would not have been a charge upon his real estate if he had lived, why should his devisees be in a worse position? The doctrine of compensation has never been carried so far as to create a constructive charge of this kind. We submit, therefore, that as the charge of £10,000 has now been satisfied, we take these estates free from any further liability.

(1) 3 Ves. 384, 385.

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Argument.

Chitty, Q.C., and *Tremlett*, for the Defendant *Helen Pickersgill Cunliffe*, co-executrix with the Plaintiff of *J. C. Pickersgill Cunliffe's* will, were not called upon, but mentioned *Re Mason's Will* (1), where Lord *Romilly* doubted whether, under the 33rd section of the *Wills Act*, the will of a predeceased child legatee should be construed as if the legatee had survived the testator.

Cotton, Q.C., and *Kekewich*, for the Defendants, Mrs. *Pickersgill's* two daughters, their husbands and children.

Judgment.

JESSEL, M.R. :—

I do not entertain any doubt whatever upon either of the questions which I have to decide.

The first question is, does this will put the parties taking under the appointments to their election? Now, I will assume for this purpose that all the appointments are absolute, though it is scarcely necessary to do so, as they are all in terms absolute.

The matter then stands thus: There are appointments by deed to a number of persons, who, in the events which have happened, take, in effect, absolute interests in reversion upon the death of the testatrix. Those interests, except of course such as are settled, are the absolute property of the appointees, and may be disposed of either *inter vivos* or by testamentary instruments. Then the testatrix makes her will; and the first question I have to consider is, does she purport by that testamentary instrument to dispose of the property comprised in the appointments and to give it to persons whom I will call her residuary legatees—they happen to be her daughters? That is a question of the construction of the instrument.

The law upon the point I take to be well settled, and it is this —that before you attribute an intention to a testator or testatrix, to dispose of that which does not belong to him or her, you must be satisfied from the form of the instrument that it does dispose of the property which does not belong to him or her—and that is all. The presumption, in the absence of evidence to the contrary, is, that the testator by his will intends merely to devise or bequeath that which belongs to him, and that presumption is in

(1) 34 Beav. 494. 11 Jur. N.S. 835.

favour of those who contend against the legatees. On the other hand, it is only a presumption, which may be rebutted even by parol evidence; and it may be rebutted by evidence shewing that, under a misapprehension of law, the testator believed that the property which did not belong to him did really belong to him.

In this case, if it were necessary—which I do not think it is—to resort to the evidence of documents for that purpose, I think they do shew that the testatrix thought she was possessed of a power of disposition over this property of which she was not possessed. As I have already said, I think the will clear without resorting to other presumptions.

Now, that being the position of things, the testatrix having executed several irrevocable appointments, she makes her will in these terms:—[His Lordship read the will as above stated, and continued:—] Certainly I cannot cut down the meaning of these plain words. She first shews a clear intention to revoke the previous appointments, and then she gives what it turns out she had no power to give; but she has clearly given all the property in question by a proper description, a description which, it is admitted, applies only to that property. That being so, she has given benefits by the same testamentary instrument to persons who would be entitled under the deeds of appointment to receive that property. Those persons are, therefore, put to their election, as it is called, the meaning of which doctrine I will describe presently. Amongst those persons there happens to be the Plaintiff himself, who is consequently put to his election as between the legacy of £10,000 given by the will and the benefits he takes under the appointment. Being so put to his election, he elects to take under the will.

The next question is one of some singularity—not on account of the difficulty of the question, but on account of the arguments which I have to deal with. The testatrix had a son of the name of *John Cunliffe Pickersgill Cunliffe*. This son became entitled in his lifetime, under the irrevocable deed of appointment of 1851, to a sum in reversion payable upon his mother's death—it was his own absolute property. He died in his mother's lifetime, and a considerable time before his mother. What was his position at the time of his death? He left his real estate to his eldest child,

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and his residuary personal estate to his executors upon certain trusts. The moment he died the rights of the parties under his will were fixed: the executors were entitled to the appointed fund, and the eldest son was entitled to the real estate. There was no power in the mother, or any one else, to take away from the executors the absolute legal ownership of the reversionary interest to which they then became entitled. It is wholly immaterial, to my mind, that the executors did not sell the reversionary interest either to pay debts or legacies, or make some other more convenient investment under the power contained in the will. Nobody could have doubted that a purchaser would have had an excellent title, and the money would belong to the creditors or the residuary legatees, as the case might be. The title of the executors was quite clear, absolute, and indefeasible.

Then the mother makes her will, and, not being entitled to dispose of this fund, she gives the real estate in *Yorkshire* to her son, who died before her, although he was not dead at the date of the will. The will, being a testamentary instrument, takes no effect till she herself dies; the son is dead, and if the law had not been altered by the *Statute of Wills*, the gift to the son would have lapsed. But the law has been altered, and consequently the gift to the son, which would otherwise have lapsed, now becomes effectual in the same manner as if the son had survived the mother, and in no other manner. The object of the 33rd section of the statute is to give effect to the testatrix's will under which the gift, which would otherwise become the subject of lapse, occurs; and it only points out the mode in which that effect is to be given.

The result, therefore, is this, that the child dying in the testatrix's lifetime has his estate augmented by the devise or bequest made to him by the testatrix; in other words, the subject of the devise or bequest falls into the estate of the child, and of course can be disposed of by the will of that child, if that will contains apt words to dispose of it. In this particular case it does not appear to me material to consider whether there were or were not apt words. If there were, the eldest son of that child takes the whole beneficially; and if there were no apt words, the same son takes the whole as heir-at-law, and therefore the eldest son in

any case becomes entitled to that estate. But how entitled? He takes it under the will of this lady, who had given it to his father, her son.

Now, as I read the statute, the father's estate is in the same position, *quoad* the will of the testatrix, as if he had survived her; and consequently, as between his estate and her disappointed legatees, her disappointed legatees are entitled to put his estate to election; that is, any disappointed legatee is entitled to say, "You shall not take the benefit given to your estate by the will unless I have made up to me an equivalent benefit to that which the testatrix intended me to take." Sometimes this is called the doctrine of compensation, which is the meaning of the doctrine of election as it now stands. The disappointed legatee may say to the devisee, "You are not allowed by a Court of Equity to take away out of the testatrix's estate that which you would otherwise be entitled to, until you have made good to me the benefit she intended for me." That means that no one can take the property which is claimed under the will without making good the amount; or, in other words, as between the devisees and legatees claiming under the will, the disappointed legatees are entitled to sequester or to keep back from the other devisees or legatees the property so devised and bequeathed until compensation is made. Thence arises the doctrine of an equitable charge or right to realize out of that property the sum required to make the compensation.

If you follow out that doctrine, you will see that the person taking the property so devised or bequeathed takes it subject to an obligation to make good to the disappointed legatee the sum he is disappointed of. Once get the doctrine into that shape and you will then see that the eldest son cannot get the estate at all without making good the necessary amount to the disappointed legatees, and it follows, as a matter of plain principle, that he has nothing to complain of. The very instrument which gives him the benefit, gives him the benefit burdened with the obligation, and the old maxim, "*Qui sentit commodum, sentire debet et onus,*" applies with the greatest force to such a case as this.

But it was argued, in substance, that the testatrix—who had no power in the world to take away a shilling from her son, or who could merely impose a condition on the object of her bounty by

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saying that he should not take the subject of the bounty without making good to other people what she intended for them—could deprive the residuary legatees of the son of that which was their exclusive property. That is contrary to the whole theory of the doctrine of election, and would have the effect of actually taking away that property from the son's residuary legatees *ex post facto* by an ambulatory instrument coming into existence after the death of the testatrix, without any compensation or satisfaction whatever.

It appears to me that, when you fairly state the argument, you see at once a plain fallacy in it. It would be extraordinary if any person could take property away from another without having a power of disposition over such property; that would be the result of the argument.

Now, one more remark and I have done. It is said, if the testatrix's son, who was bound to elect, had done so, he would have elected for his own benefit to take the real estate and give up the appointed share. That is a mistake, because he can always take both provisions if he thinks fit. He is not bound to take one and give up the other. As I said before, he may take both, but the benefit that he takes under the will is subject to the obligation upon him to make good the consequent loss to the disappointed legatees. The obligation is only to the extent of the benefit he derives: it cannot go beyond that. If this estate had been less in value than the appointed share, the fallacy would have become obvious. You cannot take away anything from the eldest son beyond the value of what he has got, which is the *Yorkshire* estate given to him; and it is not true that any one can now elect when the proper person to elect is dead. There are two persons, the person entitled to the real estate and the person entitled to the personal estate; which of them is to elect? Who can decide between them? No one can. There is no power of election in such a case, that is, of election in the ordinary sense. You must treat the case as if each of those two persons took his property separately, and then, as I said before, you must discover upon whose property the obligation lies to make good what is required to satisfy the disappointed legatees. You will then see at once the effect is to charge the *Yorkshire* estate with the deficiency,

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and it appears to me, therefore, that the persons entitled to the residuary personal estate of the son take it free of any obligation.

There will accordingly be a declaration that the Plaintiff and all other persons claiming under Mrs. *Pickersgill's* will are bound to elect between the benefits conferred on them by the deeds and the benefits conferred on them by the will; and then that the Defendant, *J. C. Pickersgill Cunliffe*, takes the *Yorkshire* estates charged with the sum of £3750.

It is not material for the present purpose to consider, and I do not decide, what are the rights of the different parties under the deed of 1863, since I wish to avoid doing anything that may prejudice the future claims of the children of Mrs. *Rodger* and Mrs. *Shepherd*.

Solicitors: *Kearsey, Son, & Hawes; Freshfields & Williams.*

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[1876 M. 243.]

Hospital Lease beyond Twenty-one Years—Void or Voidable—13 Eliz. c. 10, s. 3—Action by Governors to avoid Lease—Statute of Limitations—Demurrer.

In 1783 the then Governors of *Magdalen Hospital* demised certain property belonging to the Charity to a lessee for ninety-nine years at a peppercorn rent, and the property had been enjoyed under the lease ever since. In 1876 the present Governors of the Hospital brought an action claiming a declaration that the lease was void under the statute 13 Eliz. c. 10, and possession accordingly, whereupon the Defendants, who were persons claiming by derivative title from the original lessee, demurred to the statement of claim, on the ground that the action was barred by the *Statute of Limitations*:—

Held, that the lease was not originally void, but only voidable at the option of the successive Governors of the Hospital; that the present Governors had, by bringing the action, exercised that option, and had avoided the lease; and that the *Statute of Limitations* did not commence to run till action brought, and therefore did not apply to the case.

Demurrer overruled.

Statement.

DEMURRER.

The action was instituted by the present Governors of *Magdalen*

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Statement.

Hospital—a charity incorporated in 1768 by the Act 9 Geo. 3, c. 31—to try the validity of two leases, granted in 1783 and 1794 respectively, of a messuage and public-house known as *The Tower*, in the *Westminster Bridge Road*, and of which the Governors were seised in fee simple.

By the first lease in question, dated the 4th of December, 1783, the premises were, in consideration of the rent and lessee's covenants thereinafter reserved and contained, demised by the then Governors of the Hospital to *Charles Gilbert* for the term of ninety-nine years thence next ensuing, at a peppercorn rent, if demanded, the only covenants by the lessee being to indemnify the lessors against all taxes and assessments, and to yield up the premises at the end of the term. The lessors entered into the usual covenant for quiet enjoyment by the lessee during the term.

The only valuable consideration for the lease appeared to have been a lease of the same date, whereby *Gilbert* demised to the Governors a piece of vacant land adjoining the Hospital property for a term of fourteen years, at a yearly rent of £5.

In November, 1793, *Gilbert* was adjudicated bankrupt.

By the second lease in question, dated the 9th of October, 1794, the premises were, in consideration of the rent and lessees' covenants thereinafter reserved and contained, and in pursuance of an agreement entered into with *Gilbert* prior to his bankruptcy, demised by the then Governors of the Hospital to his assignees for the further term of fifty years, to commence from the expiration of the said term of ninety-nine years, at a peppercorn rent, if demanded; and this lease contained covenants by the lessees similar in all respects to the covenants contained in the first lease, and also a covenant by the Governors for quiet enjoyment.

Gilbert duly entered under the first lease, and he and persons claiming under him had been in possession up to the present time. The Defendants were persons claiming by derivative title from *Gilbert*, the Defendant *Knotts* being the present tenant in possession.

Prior to the issue of the writ in this action—which was instituted with the consent of the Charity Commissioners—the Plaintiffs had done no act to avoid the leases.

The Plaintiffs submitted that both leases were *ultrà vires* and

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void under the statute 13 Eliz. c. 10 (1), and also as being an improvident alienation of the property of the Hospital, and they claimed a declaration accordingly; also possession of the premises, and £105 for mesne profits from the 11th of July, 1876, the date of the issue of the writ, to the day of recovering possession.

The several Defendants demurred to the statement of claim on the ground that the action was barred by the *Statute of Limitations*.

Argument.

Roxburgh, Q.C., *Chitty*, Q.C., *Cozens-Hardy*, *Warmington*, and *North*, for the several demurrers:—

The main question is whether the ninety-nine years' lease was a good lease or not; if not, then the fifty years' reversionary lease must fail also. We submit that if the first lease was void at all it was void *ab initio*, in which case we claim by adverse possession for ninety-three years; but even assuming it to be a valid lease for twenty-one years only, so as to conform to sect. 3 of 13 Eliz. c. 10, we still claim by adverse possession for seventy-two years. All we wish to do is to justify our possession. We say we are in possession either under the lease or not; if under the lease, then the Plaintiffs cannot eject us; if not, then we claim the benefit of the *Statute of Limitations* through having been in adverse possession for the statutory period, and these proceedings are therefore too

(1) The statute 13 Eliz. c. 10, s. 3, is as follows:—

"'And for that long and unreasonable leases made by colleges, deans, and chapters, parsons, vicars, and other having spiritual promotions, be the chiefest causes of the dilapidations and the decay of all spiritual livings and hospitality, and the utter impoverishing of all successors incumbents in the same;' Be it enacted, that from henceforth all leases, gifts, grants, feoffments, conveyances or estates to be made, had, done, or suffered by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital, parson, vicar, or any other having any spiritual or ecclesiastical living, or any houses, lands, tithes, tenements, or other hereditaments, being any parcel of the possessions of any such college, cathedral, church, chapter, hospital, parsonage, vicarage, or other spiritual promotion, or any ways appertaining or belonging to the same, or any of them, to any person or persons, bodies politic or corporate (other than for the term of one and twenty years, or three lives, from the time as any such lease or grant shall be made or granted, whereupon the accustomed yearly rent or more shall be reserved and payable yearly during the said term), shall be utterly void and of none effect, to all intents, constructions and purposes; any law, custom, or usage, to the contrary anywise notwithstanding."

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late: *Magdalen College, Oxford*, v. *Attorney-General* (1); *Attorney-General* v. *Davey* (2); *Attorney-General* v. *Payne* (3). The true doctrine appears to be that a lease granted beyond the term permitted by the statute is voidable only, and not void: *Bac. Abr.* (4); *Lincoln College's Case* (5); *Co. Litt.* (6).

Argument.

Davey, Q.C., and *Decimus Sturges*, for the Plaintiffs, were not called upon, but mentioned *Pennington* v. *Cardale* (7) as an authority that leases granted not in conformity with an enabling statute are not void, but only voidable at the option of the landlord: in the present instance, the issue of the writ being an avoidance of the lease. They also admitted that, having regard to the decision in *Attorney-General* v. *Payne*, they could not now set up the question of improvidence.

Judgment.

JESSEL, M.R.:—

Mr. *Davey*, I am sorry to say that I cannot hear you in this case.

It may be very improper for a Judge to express an opinion or hope that the Court of Appeal may find some ground for reversing his decision, but I certainly entertain that opinion myself; and if I were not compelled to follow what I am afraid is strictly the law of the case, I certainly should be very glad to decide in favour of the Defendants; but of course I cannot allow myself to be influenced by any such consideration.

The lease is a lease granted for ninety-nine years by the Governors of *Magdalen Hospital*, which is a charity. The lease was granted in 1783, and it seems to have been granted for value, for ninety-nine years, at a peppercorn rent. The consideration may have been, and perhaps was, inadequate: that I do not know; but whether it was adequate or inadequate, I am afraid it can make no difference as far as my decision is concerned. The land comprised in it has been enjoyed under that title ever since; and of course that title would not come to an end until the year 1882.

(1) 6 H. L. C. 189. 3 Jur. N.S. 675
(2) 4 De G. & J. 166.
(3) 27 Beav. 168.
(4) 7th Ed. vol. iv. pp. 761 *et seq.*
(5) 3 Rep. 60 a.
(6) 45 a.
(7) 3 H. & N. 656.

Then it would come to an end, although there appears to have been a reversionary lease granted in 1794 for a further term of fifty years; and I suppose that, had it not been for that further term, we should not have heard of this action. The charity, who are Plaintiffs in this action, assert that by virtue of the statute of 13 Eliz., one of the restraining statutes, that lease is prohibited by law. Upon that point I have heard no argument. It is incontestible that a lease is voidable if not void, whatever the effect may be. It seems that the Defendants, as I said before, have entered and retained possession up to the present time under that lease, and they, by themselves or by their tenant, are now in possession, and the question is, whether the *Statute of Limitations*—a most useful and beneficial statute—applies to the case which I have to consider. Now in order to apply that statute you must have what is called adverse possession, or—since, strictly, adverse possession was put an end to—you must have what in one sense is equivalent to it, that is, a present right to bring an action for the recovery of land, as it is now called, or a right to make an entry or distress, as it was called in the statute itself, accruing in the person more than twenty years before action brought. That does not mean he had a right for more than twenty years, but, if I may so express it, the last right he had was more than twenty years old. Well, that being so, the question I really have to decide is, whether the last right accrued at the time of action brought—as the Plaintiffs contend—or whether it accrued more than twenty years ago. Now, of course, if it accrued at the date of the lease, which is the contention of the Defendants—that is, in 1783—it accrued much more than twenty years ago. If it accrued at the time of action brought it has accrued within the last few months; that is a point to be considered. I am sorry to say that I have arrived at the conclusion that it accrued at the time of action brought.

Let us see how the matter stands upon principle and independently of authority. A statute is passed declaring a lease void "to all intents and purposes," and the reason given is that such leases have been found prejudicial to the church and charities; that is the substance of it. Could it be tolerated that a charity, or a bishop, or a rector, should grant a lease, say, for twenty-two years, when a twenty-one years' lease only was authorized, and

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because no rent was received for twenty-two years, the lease being granted at a peppercorn rent, the tenant should hold the land in fee simple against the church or charity? The mere statement of such a proposition shocks one's intellectual conceptions. The notion that a man could, by contract, take possession of the land of a church or a charity for a term, having paid some consideration for it, and say at the end of the term, "Oh! that lease was void; you knew it was void, and so did I; I will keep the land in fee simple, because the *Statute of Limitations* transfers the title as soon as the statutory period has run," is absurd. Of course that was perfectly impossible, and any such notion would have been, I have no doubt, scouted in former days, and could not have been seriously arguable in the present day. How, then, was that absurdity got rid of? Simply by holding that the lease was voidable. A man who has taken a lease cannot say it is void; and that very question was decided soon after the passing of the statute which enabled bishops to grant leases (32 Hen. 8, c. 28). At that time, although the case is no longer so, the bishops were absolutely entitled to the possessions of their sees during their lives; that is, they were entitled to the fee, but of course, being a corporation sole, the ownership ceased with their demise, and consequently, in fact, though not in law, they had life estates only. It was held to be quite impossible to maintain that when a bishop had taken a fine for granting a lease and put it in his pocket, he could be allowed the next day to re-enter and say the lease was void. The Courts held it was voidable in the sense that it was voidable by the successor, but perfectly good against the bishop himself; and that it was not the meaning of the statute that the bishop could himself avoid the lease, but that he himself was bound. Of course the lessee was bound, nobody doubts that for a moment; nobody suggests that he was not. Then, as against the successor, it was voidable only, but not void, for if he went on receiving rent the lease was good as against him. But supposing the successor chose to say, "I will not interfere," nobody has held, so far as I know, that the lessee could then throw up the lease. But that point does not rest merely upon one's *à priori* notions, as I have said before, as to how the statute should be construed—for it should be construed in a reasonable way. There is actual decision upon the point, and

I will only refer to the last case, which was a decision alluded to by Mr. *Davey*, namely, *Pennington* v. *Cardale* (1). There there was a dean and chapter lease. No doubt the corporation had a head, but for this purpose that is immaterial. It was a dean and chapter lease, and the dean who granted the lease had long been dead. The lease was granted in the year 1786, and the action was brought in 1856, the decision being in 1858. One of the questions was, whether the lease was void or voidable; and another question was, whether there had been actual possession under the lease, which was invalid according to the statute. The judgment was delivered by the Court of Exchequer by Mr. Baron *Martin*, on behalf of the full Court; he says this (2): "At common law the dean and chapter had the fee simple absolute"—of course that applies to this corporation—"and the effect of the disabling and restraining statutes is to render leases granted not in conformity with them voidable, but not void." That is the effect of the statute. Now we have a similar series of decisions on another branch of leasehold law, that is, where a proviso in a lease declares that in case the lessee commits some breach of covenant the lease shall be void, very often in the words of the statute, "to all intents and purposes." Still, in those cases the Courts have held that it is quite impossible for a lessee to say the lease is void. It is binding upon him; he has accepted it; that is to say, he is estopped from saying it is void. I do not know any better expression to use than that. He cannot be allowed to say that it is void; it is the landlord who has the election. The proviso being put in for the benefit of the landlord, the election to avoid the lease rests with him alone. If, then, you apply the same mode of reasoning to the statute, you have a proviso put in by the Legislature, but it is, no doubt, for the benefit of the charity; so that when new governors come who were not parties to what their predecessors had done, and they look into the state of the charity property, they are entitled to say, "What our predecessors did was wrong, and we will make void their acts, it being contrary to law and all parties knowing it was contrary to law." In this particular case it is a case of very great hardship, on account of the enormous length of time that

(1) 3 H. & N. 656. (2) 3 H. & N. 666.

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has elapsed, because people who acquire real property, as a rule, do not go so far back as to inquire into these ancient proceedings. I am very sorry when I see this sort of case brought forward, even by a charity, however excellent it may be, to disturb a long-continued possession. Still, we must not forget that the Defendants' predecessors in title had notice of all this; they knew of the statute, and they knew they were dealing with the charity. Therefore they must be considered to have taken that which, whether they actually knew it or not, in contemplation of law they must be considered to have known, and therefore, they having taken a voidable lease, and the charity having now chosen to avoid it by issuing the writ in this action, this statute must apply. I was pressed in argument with three cases, one of which was the well-known *Magdalen College Case* in the House of Lords —the other two cases appear to me simply to have followed it— and which decided that Courts of Equity being now bound by the *Statute of Limitations*, the equitable title may be barred if it is not asserted within the period of twenty years from the time it accrued. The nature of the cases shortly stated may be summed up in this way. I am not now speaking of the actual facts, which to my mind are not material, but the facts upon which the decisions went, for in judging of the foundation of the decisions you must not inquire too narrowly into what the facts actually were. In considering any decision the question always is, what the facts were which were accepted by the Judge as facts, because his decision must have relation to that state of facts, and to no other. The facts accepted by the Judges were simply these: The lease, which was assumed and taken to be valid at law, though impeachable in equity, either for having been granted at an inadequate value, or for some other sufficient reason, was sought to be impeached in equity when more than twenty years had elapsed after the lease was granted. Now, no doubt, there was a right to impeach the lease upon equitable grounds immediately after it was granted. It was not like a case of avoidance, it was an original defect in granting the lease. It was said—and, if I may say so, correctly said, speaking of decisions which are binding upon me, one being a decision of the House of Lords, and another a decision of a

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Lord Chancellor—that this was a title which accrued to a person, or a class of persons, more than twenty years before the suit was brought; and there is no reason why the same rule which applies to those who claim beneficially by reason of a will or deed should not apply to people who claim the benefit of a charity, or any other class of persons. Consequently, at the end of twenty years the statute must be taken to apply. That being my view of the case, I must overrule these demurrers. The costs will be costs in the action.

Solicitors for Plaintiffs: *Wordsworth, Blake, Harris, & Parson.*
Solicitors for Defendants: *Pownall, Sons, Cross, & Knott; James, Curtis & James; Roberts & Barlow; Yarde & Loader.*

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[1864 H. 42.]

Will—Construction—Gift to A. for Life, with Remainder to her unborn Children, and "Children's Children"—Remoteness—Estate Tail—Cy-près—Practice—Jurisdiction as to future Rights.

A testator directed that on his daughter attaining twenty-one, his trustees should pay the income of his freeholds and copyholds to her during her life; "and should she live to become marriageable, and die leaving a child or children behind her born in lawful wedlock," then that his trustees should apply the income to the support and maintenance of "such child," if only one, or, if more than one, equally among "such children during their lives, and in like manner to their children and children's children, each family having the father or mother's share; or should his said daughter die previous to being married, or after marriage leaving no child or children behind her born in lawful wedlock, or, if leaving children as afore-described, upon them or their families becoming extinct," then over.

The testator's daughter survived him and attained twenty-one, she being his sole heiress-at-law and a spinster.

The following questions then arose: First, whether the gift over after her life estate was not void for remoteness; secondly, if not, whether she was not entitled to an immediate estate tail in possession; and thirdly, whether, admitting that she took an estate for life, and that her children (if any) took life estates in remainder, she did not take an estate tail in remainder expectant on those life estates:—

Held, first, that the gift over after the daughter's life estate was not void

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for remoteness; secondly, that she did not take an estate tail in possession; but that the third question could not be decided at present, as it related to future rights.

Hayes v. *Hayes* (1) held not to be law.

Forsbrook v. *Forsbrook* (2) discussed.

The *cy-près* doctrine considered and explained.

Statement.

JOHN HAMPTON, by his will, dated the 5th of November, 1862, directed his trustees that, on his daughter, *Mary Ann Hampton*, attaining the age of twenty-one years, she should have the full amount of the annual proceeds arising from his freehold, copyhold, leasehold, and funded property during her life for her separate use, after deducting certain annual and other payments. The testator then proceeded as follows:—"And should my said daughter, *Mary Ann Hampton*, live to become marriageable and die leaving a child or children behind her born in lawful wedlock, then it is my will, and I hereby direct my said trustees or their successors to apply the proceeds of my estate, after the deductions aforenamed, to the support and maintenance of such child, if there is only one, or if more than one, in fair and equal proportions among such children for and during the term of their natural lives, and in like manner to their children and children's children, each family having among them the father or mother's share: or should my said daughter, *Mary Ann Hampton*, die previous to being married, or after marriage leaving no child or children behind her born in lawful wedlock, or, if leaving children as aforedescribed, upon them or their families becoming extinct," then over.

The testator died on the 14th of November, 1863. On the 12th of March, 1864, a decree was made for the administration of the testator's estate in a suit in which his daughter, *Mary Ann Hampton*—who was his only child—was Plaintiff, and the sole acting trustee and executor of the will was Defendant.

The Plaintiff attained her age of twenty-one years on the 23rd of August, 1876, and now presented a petition that the Defendant might be ordered to convey the testator's freehold, copyhold, and leasehold estates to her absolutely, on the ground that the limitations contained in the will subsequent to the limitation to her for

(1) 4 Russ. 311. (2) Law Rep. 3 Ch. 93.

life, were void for remoteness, and that consequently the estates passed to her as the testator's sole heiress-at law and next of kin.

Cookson, Q.C., and *Tremlett*, for the Petitioner:—

The main question in this case is as to the effect of the testator's gift of his freehold and copyhold estates.

According to *Hayes* v. *Hayes* (1), the gift over after the daughter's life estate is void for remoteness, for there Sir *John Leach* held that an estate cannot be limited to an unborn child for life, unless the remainder vests in interest at the same time.

It appears, however, from *Boughton* v. *James* (2), that Sir *John Leach* was dissatisfied with his decision, and, no doubt, it cannot be reconciled with *Williams* v. *Teale* (3), *Gooding* v. *Read* (4), and *Gooch* v. *Gooch* (5). It is also questioned in *Jarman* on Wills (6). Indeed it is difficult to see why, after the well-known decision in *Cadell* v. *Palmer* (7), the gift should be void for remoteness.

If the gift is not void for remoteness, then we submit that the Petitioner takes an immediate estate tail in possession, by the application of the *cy-près* doctrine. This is really a gift to *A.* for life, with remainder to his children for life, with remainder to their children for life, and so on; and it is well settled that in such a case the effect of giving life estates to successive generations, to be multiplied indefinitely, is to create an estate tail in *A.*: *Mortimer* v. *West* (8); *Earl of Tyrone* v. *Marquis of Waterford* (9).

Again, the words "children's children" may be taken to mean "issue," or "heirs of the body," which would still create an estate tail in possession in the Petitioner: *Trash* v. *Wood* (10); *Roddy* v. *Fitzgerald* (11); *Jesson* v. *Wright* (12).

But assuming that the Petitioner takes an express estate in possession for life, and that her children, if she has any, take life estates in remainder, a possible construction is that she is entitled

(1) 4 Russ. 311.
(2) 1 Coll. C. C. 26, 37.
(3) 6 Hare, 239.
(4) 4 D. M. & G. 510.
(5) 14 Beav. 565; 3 D. M. & G. 366.
(6) 3rd Ed. vol. i. p. 261.
(7) 7 Bli. N. S. 202.
(8) 2 Sim. 274.
(9) 1 D. F. & J. 613; 29 L. J. (Ch.) 486. 6 Jur N.S. 567.
(10) 4 My. & Cr. 324, 328.
(11) 6 H. L. C. 823, 881, 882.
(12) 2 Bli. 1.

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Argument.

to an estate tail in remainder expectant on those life estates: *Forsbrook* v. *Forsbrook* (1).

JESSEL, M.R.:—That is a question I cannot decide now.

W. Barber, for parties entitled under the ultimate gift over, was not called upon, but mentioned *Parfitt* v. *Hember* (2).

Chitty, Q.C., and *S. Cracknall*, for the Defendant.

S. J. Cracknall, for other parties.

Judgment.

JESSEL, M.R.:—

The questions raised on this will are by no means easily solved, and I am thankful to say I have only to solve two of them. The questions are of general interest on the law and practice of the Court, and also on the general law of real property as regards the construction of devises.

The first question I have to consider is as to the general practice.

The Petitioner is confessedly entitled for her life, under a will, to freeholds and copyholds which are settled upon trusts for her benefit. She claims that, according to the true construction of the will, what is expressly given to her for life is also given to her for an estate larger than an estate for life; that is to say, that she takes an estate tail in equity in the lands in question, and she asks me for a declaration accordingly, and for conveyance of the lands to her on the footing of that declaration. Of course, if that were my opinion on the construction of the will it would be my duty to comply with her prayer. That question is therefore ripe for decision.

Another question is, whether, supposing she is not entitled to an estate tail, the gifts over after her life estate are not void for remoteness, and if so, whether she is not, as the testator's sole heiress-at-law, entitled to the whole property absolutely. That is also a question which I can now decide.

The third question suggested is whether, admitting that she takes an express estate for life and that her children, if she has any, take estates for life after her death, she is not entitled to an estate tail

(1) Law Rep. 3 Ch. 93, 99. (2) Law Rep. 4 Eq. 443.

in remainder expectant on those life estates, and to a declaration accordingly.

That, according to the practice of this Court, is not a question which can be decided now.

It was always the settled law of the old Court of Chancery, and it is therefore now the settled law of the Chancery Division of the High Court of Justice, that it is not the province of the Court to declare the rights of parties except in cases where immediate relief can be given. The immediate relief may be merely incident to the estate, as for instance, where a question arises as to the cutting of timber by a tenant for life or remainderman.

So where an estate is vested in a tenant for life with remainders over, and the person to whom the life estate is given claims that under the limitations over he is really tenant in tail in possession, and asks by bill that the estate may be conveyed to him—that is allowed. But where the Court is asked to do nothing more than to declare future rights, it is clear that the Court will not make any declarations as to future rights, and as an authority for that proposition I will only mention the case of *Lady Langdale* v. *Briggs* (1), before the Court of Appeal.

I am rather surprised, on looking at *Forsbrook* v. *Forsbrook* (2), to find that the Lords Justices actually decided contrary to the rule. Their decision was, in substance, this: the tenant for life under a will being alive, and the tenant in immediate remainder being also alive, they decided that there was an ultimate remainder in tail in the tenant for life. That transgressed the well-established rule of the Court. The question is whether that was unintentional, or whether the Lords Justices intended deliberately to reverse the rule. I am satisfied that it was a mere slip, and the proof that it was so is this, that when the case—it was a special case—was brought on, they noticed that in any event the Plaintiffs, who were the persons in possession, must be entitled for life, and they therefore took the objection that there was no matter at present in dispute which would give the Court jurisdiction to decide the questions, the rule applicable to an ordinary suit being of course equally applicable to a special case. They therefore took the very point themselves. Mr. *W. Pearson*, on behalf of the

(1) 8 D. M. & G. 391. (2) Law Rep. 3 Ch. 93.

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Plaintiffs, then argued against the objection at considerable length, and concluded by submitting that the Court should, if necessary, give leave to amend the special case by inserting some question which would give the Court jurisdiction, as for instance a question respecting the Plaintiff's right to commit waste. The Lords Justices thereupon gave permission to amend the case by inserting a question whether the Plaintiffs were entitled to commit waste, and the main argument then proceeded. They therefore acknowledged the rule, and accordingly maintained the objection, and Lord *Cairns*, in delivering judgment, observed (1), "We have already said that the special case must be amended by stating that the first takers desire to know whether they have power to commit waste, and the answer to the question must be that they are not so entitled."

It is quite plain, therefore, that the Lords Justices in deciding as they did, that the existing tenants for life took an ultimate remainder in tail upon the determination of other life estates, did not really intend to alter the rule.

That being so, the question whether the Petitioner in this case does or does not take an estate tail in remainder is not ripe for decision, and consequently I ought not to express, and I do not express, any opinion upon it.

Now as to the first point raised by the Petitioner, the question would not have been arguable had it not been for one authority, and I must again express an opinion similar to that I have already expressed, and say that there the Judge made a slip, as all Judges do at times.

The authority to which I refer is *Hayes* v. *Hayes* (2), which was a decision of Sir *John Leach*. It was there held that you cannot limit to an unborn child for life unless the remainder, after his death, vests in interest at the same time.

It never was law that the remainder must vest in interest at the same time. You might always give a life interest to an unborn person being a child of a person in being, and it did not matter what the gift over was after the death of such unborn child; it did not affect his interest. There must be some mistake in that decision; at all events it has never been followed. As I

(1) Law Rep. 3 Ch. 98. (2) 4 Russ. 311.

read the authorities, it has not only not been followed but the contrary construction has prevailed. Indeed the contrary has been assumed, sometimes without contest, in some reported cases, and in order to shew that that is so I may refer to the case of *Gooch* v. *Gooch* (1). There a gift to children for their lives was assumed to include unborn children, and the bill only asked that the substitutionary gift over to their children might be declared void for remoteness.

In *Williams* v. *Teale* (2) the decision was exactly the reverse of that in *Hayes* v. *Hayes* (3), and it is only necessary for me to read the following portion of Sir *James Wigram's* judgment (4): "Upon another point I have also as strong an opinion as may be consistent with the respect which is due to the decision of a very eminent Judge, with which it possibly may be thought to conflict. I think that, under this will, notwithstanding the decision in *Hayes* v. *Hayes*, the limitation of the testator's property to the unborn children of the testator's children is not void for remoteness only because it is a gift to persons who might be unborn at the death of the testator."

It is plain to my mind that Sir *James Wigram's* decision is in direct conflict with Sir *John Leach's*.

The next case—which was a case before the Court of Appeal—is *Gooding* v. *Read* (5). There a testator devised lands upon trust to pay the rents and profits to a tenant for life, and, after her decease, and until her youngest child should attain twenty-five, to pay the rents and profits for the maintenance of her children, and on the youngest child attaining twenty-five, to sell and divide the proceeds among all the children of the tenant for life then living, and the issue of such as should be dead. It was objected that the trusts for the children were void for remoteness, the question being whether the maintenance gift was good, that is, the gift to the children until the youngest attained twenty-five. The Master of the Rolls held it was good, and that decision was appealed from, the Appellants contending that the trust for sale being void for remoteness, the trust for maintenance was insepa-

(1) 14 Beav. 565; 3 D. M. & G. 366.
(2) 6 Hare. 239
(3) 4 Russ. 311.
(4) 6 Hare, 250.
(5) 4 D. M. & G. 510.

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rable from it, and therefore also void. The Lords Justices, however, dismissed the appeal with costs. *Hayes* v. *Hayes* (1) does not appear to have been cited in that case; it is only mentioned in the reporter's note.

Now I take it that both the cases to which I have referred are not to be reconciled with *Hayes* v. *Hayes;* at all events, they differ from it so far as to leave me at liberty now to say that *Hayes* v. *Hayes* is not sound law; indeed it appears that Sir *John Leach* himself was dissatisfied with his decision.

That being so, it follows in this case that, whoever takes an estate tail—if any one does—at all events there is here a gift to the "child or children" of the Petitioner, and that, whether the Petitioner takes an estate tail, or her "child or children" take an estate tail, or no one takes an estate tail, the gift is not void for remoteness; and if *Hayes* v. *Hayes* is out of the way the children may well take estates for life.

I am, therefore, of opinion that the gift over after the Petitioner's life estate is not too remote. Then, does the Petitioner take an immediate estate tail in possession? Now, there is a great deal to be gathered in favour of this view from some of the older authorities, because they give rise to considerable difficulty as to determining what words are sufficient to create an estate tail.

First of all, there is the doctrine usually called *cy-près.* It has been said that that doctrine only applies to executory trusts; but that is not so. In the first place, the doctrine is not properly called *cy-près* at all: it is merely a rule of construction—a rule of construction, that is, by which you sacrifice the particular intent to the general intent, or the subordinate intent to the paramount intent. When you find two intents in a will which are inconsistent with each other, and you therefore cannot carry out both, you give effect to the general or paramount intent. The rule applies just as much to direct devises as to executory trusts—where trustees are directed to convey or do some other act. That the doctrine is a rule of construction is laid down in the most express terms by Lord *Romilly* in *Parfitt* v. *Hember* (2). He says (3): "I think the doctrine of *cy-près* established by *Hum-*

(1) 4 Russ. 311.
(2) Law Rep. 4 Eq. 443.
(3) Law Rep. 4 Eq. 446.

berston v. *Humberston* (1) is not a doctrine to be confined to cases where the testator has made a will of an executory character, and has imposed on the Court, or on persons surviving them, the duty of carrying his general intention into effect by framing a settlement for that purpose, but that this doctrine is a rule of construction, and that, when the Court finds that the object expressed by the testator is to give to *A.* an estate for life, to *A.'s* eldest son another estate for life, and to his eldest son a third estate for life, and so on, the Court will carry that intention into effect as nearly as it can."

It may be said that that was only a *dictum,* not necessary for the decision of the case, but I will now refer to another case which is an actual decision on the point, namely, *Monypenny* v. *Dering* (2). That was a case which was sent to a Court of Law—the Court of Exchequer—and therefore the Judges could only treat the case as one of express and direct legal devise. The Court there discussed this doctrine which they called the doctrine of *cy-près.* [His Lordship then read part of the judgment at pages 428, 429, commencing, "The doctrine of *cy-près,* in reference to questions of perpetuity," down to the words "sacrificed to that extent his particular intention"—and continued:—]

Now in neither of these two last cases is there a trace of a restriction of the doctrine to executory trusts, and when you see it is originally a rule of construction, and the reason of the rule, there is no reason why it should be so restricted.

In *Monypenny* v. *Dering* it was said that you cannot apply the rule where the effect of so doing will be to make the estate devolve in a line of succession different from that which the testator has expressly designated. In *Jesson* v. *Wright* (3) the question was whether certain words—"heirs of the body"—could be controlled by the context, and it was held that technical words must have their legal effect, unless from other inconsistent words it is clear that the testator meant otherwise. In that case the House of Lords held, in accordance with what has been the universal opinion of the profession since, that the other words of the will were not sufficient to interfere with that well-established rule of law.

There are, however, some observations of the House of Lords in

(1) 1 P. Wms. 332. (2) 16 M. & W. 418. (3) 2 Bli. 1.

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that case to which I should like to refer. The Lord Chancellor says (1): "It is a general rule of law, to be collected from a consideration of all the cases, that a particular intent expressed in a will must give way to a general intent. It is surprising that so much pains should have been taken to establish such a rule, the effect of which is, usually, to enable the first taker to destroy both general and particular intent. The words 'heirs of the body,' *primâ facie*, mean all descendants; and it is likewise a rule of law that all descendants should take under these words, unless they are clearly qualified and restricted by other words so as to give them a more limited sense. The great judicial difficulty arises in the application of these rules to the words of each will. I cannot admit that all the cases cited have been well decided; but it was hardly to be expected that Judges should agree in the decision of all these cases; for the mind is overpowered by their multitude, and the subtlety of the distinctions between them." To that last observation I entirely agree. The House then took time to consider their decision, and at page 53 the Lord Chancellor says: "The words 'heirs of the body' will indeed yield to a particular intent that the estate should be only for life, and that may be from the effect of superadded words, or any expressions shewing the particular intent of the testator; but that must be clearly intelligible and unequivocal."

Now we are really brought to this, whether there are or are not sufficient words in this will to shew clearly and unequivocally that the words "child or children" mean "issue" or "heirs of the body"—in other words, whether the case comes within the authorities which decide that a gift to a person for life, with remainder to his children for life, with remainder to their children, creates an estate tail in the first taker.

In the first place, what is there in this will to control the ordinary meaning of the words "child or children?" The testator begins by saying in case his daughter should "die leaving a child or children behind her born in lawful wedlock." There it is obvious that the word "child" is used in its ordinary sense. Then, after directing the annual proceeds of his estates to be applied for the support and maintenance of such child or children for their lives

(1) 2 Bli. 49.

the testator proceeds, "and in like manner to their children and children's children." Now, what is there to shew that the word "children" there is not also to be construed in its natural sense? It appears to me that there is nothing in the will to shew that the word "children" is not to be construed in its natural sense.

Then the question is, whether there is an intention to give life estates to the "children and children's children" of the daughter's children, so as to bring the case within *Mortimer* v. *West* (1). I am of opinion that there is not. The testator says the property is to go to the daughter's children "for their natural lives, and in like manner to their children and children's children." Why should "in like manner" necessarily mean "for their natural lives"? It means simply that the property shall go "in like manner," that is, go to them successively, but not necessarily for their lives.

Supposing it does mean "for their lives," then we have a succession of life estates, and I am told that according to *Mortimer* v. *West*, that would create an estate tail in the daughter. There is a good deal to be said in favour of that view, because Lord Justice *Rolt* said in *Forsbrook* v. *Forsbrook* (2) that a succession of life estates might, by applying the doctrine of *cy-près*, be held to create an estate tail in the first taker, and I should feel bound, if necessary, to follow the opinion of a Lord Justice. But in *Mortimer* v. *West* there was an evident and expressed intention that the children and children's children should take estates for life, but here there is no such clear intention. It appears to me, therefore, that that case does not oblige me to decide what I do not intend to decide.

Even if the *cy-près* doctrine applied, what is the meaning of sacrificing the particular intent to the general intent? It means only so far as it is necessary to do so. This was overlooked in the earlier cases; and the true explanation of the principle was, I believe, first suggested by Lord *Denman* in *Doe* v. *Gallini* (3); so that, in order to carry out a testator's imperfectly expressed intention to include under the limitations in his will every member of his family, you can give, first, an estate for life to the first

(1) 2 Sim. 274. (2) Law Rep. 3 Ch. 93.
(3) 5 B. & Ad. 621; 3 A. & E. 340.

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taker, and preserve an estate to the children, and then you imply an estate tail in remainder to the first taker: that is to say, you sacrifice the particular intent to the general intent, but you do not imply new limitations so long as the old limitations can be carried out.

If you say that you only sacrifice the particular intent so far as may be necessary to carry out the general intent according to law, that is to express what I think is the rule; and this principle was recognised in *Forsbrook* v. *Forsbrook* (1), where, upon the construction of the will, the Lords Justices preserved life estates to the children of the first takers, and gave estates tail in remainder to the first takers. Therefore, if it were necessary for me now to do so, I might decide in accordance with that view; but I have only to decide now that the children of the Petitioner, if she should have any, take life estates in this property. Whether it is well given over, it is not necessary for me now to decide, but the question will arise after the death of the children whether or not the effect of the gift to the Petitioner's children's children is to vest in her an estate tail in remainder; that question, as I have said, I refuse to decide now.

That being my view of the case, I will only decide at present that the Petitioner takes an estate for life, and that she does not take an immediate estate tail in possession; and I give no opinion as to what becomes of the property after the death of her children, if she has any.

There will, therefore, be simply a declaration that the Petitioner does not take an estate tail in possession in the testator's freehold and copyhold estates, nor an absolute estate in the leaseholds, but a life estate only.

Solicitors: *O. Leefe; Frank Richardson & Sadler; White & Sons; J. Fawcett.*

(1) Law Rep. 3 Ch. 93.

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Jan. 30.

[1876. I. 43.]

Sale of Goods—Dock Warrant—Delivery Order—Purchase by Broker for Undisclosed Principal—Suretyship—Lien of Unpaid Vendor—Usage of Dry Goods Market.

Post 213

According to the usage of the *London Dry Goods Market*, a broker who contracts for the sale of goods without disclosing his principals is personally liable in default of his principal.

On the 3rd of March certain goods belonging to Messrs. *C.*, lying at the *St. Katharine Dock*, in the custody of the *Docks Company*, were bought by *D.*, as broker for buyers and sellers, for *B. & Co.*, without disclosing the names of his principals, and *D.* indorsed to them the delivery order he had obtained from the sellers, on the representation of *B. & Co.* that the goods were wanted for immediate shipment. They, however, pledged their interest in the goods to the Plaintiffs, and indorsed the order to them. On the prompt day, the 18th of March, the Plaintiffs' clerk lodged the order at the *London* office of the *Docks Company*, with this memorandum, "Hold within to our order, and have warrants made out as soon as possible." He was told that the warrants would be ready with the goods on the 20th of March. Three hours later a messenger from the office reached the warrant office at the *Dock House* with a notice that the order had been lodged. Meanwhile *B. & Co.* had stopped payment, and *D.* being so informed, and having no notice of the Plaintiffs' title, on the same day paid Messrs. *C.* for the goods, and through a clerk, who reached the *Dock House* before the messenger had arrived, obtained at the warrant office a warrant for the goods in the name of Messrs. *C.*, who indorsed the same to *D.*, and gave him a second delivery order. The first delivery order was returned to the Plaintiffs by the *Docks Company*, who refused to act upon it.

In an action by the Plaintiffs, claiming, as against the *Docks Company*, Messrs. *C.*, and *D.*, to be entitled to the goods :—

Held, that *D.* was the surety and *B. & Co.* the principal debtors; that, in the circumstances of the case, the unpaid vendors' lien had passed to *D.*; that the title to the goods was in *D.*; and that Messrs. *C.* were not necessary parties to the suit.

Statement.

THIS was an action by the *Imperial Bank*, who claimed to be entitled, against the several Defendants, the *London and St. Katharine Docks Company*, Messrs. *J. & E. Carter*, and *Herbert Dalton*, to certain goods in the custody of the *Docks Company*.

The *Docks Company* are the owners and occupiers of the *London*

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Docks, the *St. Katharine Docks*, and the *Victoria Docks*. They have a central office in *Leadenhall Street*, where part of the management of the business is carried on, and where papers and documents in regard to goods in the *Docks Company's* care are frequently left. All dock warrants for goods warehoused with the *Docks Company* at the *St. Katharine Docks* are signed only at an office, called the "Warrant Office," in the long room of the *St. Katharine Dock House*.

The practice of the *Docks Company* with respect to the issuing of dock warrants is as follows:—Before a dock warrant is issued, a request for the warrant in respect of the goods for which it is required must first be presented to the cargo ledger clerk, who takes steps for ascertaining that the goods are in the company's possession, and are deliverable to the person in whose name the application for the warrant is made, and that there are no stops for freight or notices of other liens or claims which would prevent the goods being disposable by the person in whose name the application for a warrant is made. For the purpose of obtaining this information, the cargo ledger clerk refers to the "cargo ledger" relating to the cargo of which the goods for which a warrant is applied formed part. This as regards goods at the *St. Katharine Dock* is kept in the long room at the *St. Katharine Dock House*. When the clerk has satisfied himself that the goods are clear, he prepares a paper called a warrant form, containing the particulars to be entered in the warrant. The form is then taken to the warrant office, and the warrant is prepared there from the warrant form. Particulars of the delivery of the warrant, the name of the person in whose favour it is made out, and the date of its delivery, are entered in the cargo ledger before any warrant is issued.

At the time of the transaction which led to this action, Messrs. *Carter* were the consignees of eighteen casks of gum sandrac, which were in the custody of the *Docks Company* at the *St. Katharine Dock*. On the 3rd of March, 1876, the said goods were bought by *Dalton* (who was a broker, and who acted as broker for buyers and sellers) for undisclosed principals, payment to be made in fourteen days. The bought and sold notes were signed, and Messrs. *Carter* signed a delivery order addressed to the *Docks Company's* superintendent, and requiring delivery to *Dalton's* order.

The goods were bought by *Dalton* for *Brousson, Wagler, & Co.*, who represented to him that the goods were wanted for immediate shipment, and to whom *Dalton* indorsed the order.

About that time the Plaintiffs applied to *Brousson & Co.* to give security to cover their banking account, and on the 4th of March, 1876, in consideration of an advance of £1470 made by the Plaintiffs, *Brousson & Co.* signed a memorandum to the effect that they therewith deposited with the Plaintiffs, as security, the documents of title of various goods therein specified (including the said eighteen casks of gum sandrac), and they indorsed the delivery order to the Plaintiffs, and deposited the same with them.

On Saturday, the 18th of March, 1876, which was the prompt day, the Plaintiffs sent a clerk to the office of the *Docks Company* in *Leadenhall Street*, with the delivery order and the following memorandum thereon: "Please hold the within to our order, and have warrants made out as soon as possible." The order was received at the office about twelve o'clock, and the Plaintiffs' clerk was requested by the official at the office to leave it for the purpose of having the warrants made out, and was told that they would be ready with the goods on Monday, the 20th of March. Shortly afterwards a messenger was sent from the office to the warrant office in the long room at the *Dock House* with a notice that a delivery order had been lodged, but he did not arrive at the *Dock House* till 3 P.M.

On the same morning *Dalton* applied to *Brousson & Co.* for payment of the goods, when they informed him that they had stopped payment. He thereupon sent Messrs. *Carter* a cheque for the value of the goods, and his clerk went to the long room of the *Dock House*, arriving there at two o'clock on the same day, before the arrival of the messenger from the office in *Leadenhall Street*, and produced an order to prepare a warrant for the goods in the name of Messrs. *Carter*. The *Docks Company* alleged that, as the warrant required was to be made out in the names of the persons at whose disposal the goods were, namely, Messrs. *Carter*, no authority of the person bringing the document to receive the warrant was in the ordinary course of business required. The cargo ledger shewed that the goods were standing in the name of

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Messrs. *Carter*, and were clear. The warrant was then made out and handed to the said clerk, who signed a receipt for it in terms for Messrs. *Carter*, and took it away with him by half-past two o'clock, before the delivery order of the Plaintiffs had been presented or delivered at the long room of the *Dock House*, and before any notice of such order had arrived there.

On Monday, the 20th of March, 1876, *Dalton* sent to Messrs. *Carter* the warrant for their indorsement, which they thereupon indorsed to him, and gave him a second delivery order for the goods. On the evening of the same day the Plaintiffs first informed Messrs. *Carter*, who afterwards told *Dalton*, that the bank held the first delivery order as a security for their advances to *Brousson & Co.*

On the same day the first delivery order was returned to the Plaintiffs by the *Docks Company* with the following memorandum: "The annexed order cannot be acted upon. Warrants required." The Plaintiffs now claimed to be entitled as against all the Defendants to the said eighteen casks of gum sandrac.

The Defendants, the *Docks Company*, by their statement of defence, submitted that in respect of the said goods they were mere wharfingers or bailees.

The Defendants, Messrs. *Carter*, by their defence, made no claim to the goods, and submitted that they were not proper parties to the action.

The Defendant *Dalton* claimed that he had by the custom of the trade a lien, as unpaid vendor or owner, upon the said goods for the price thereof, and was entitled to retain the same as against the Plaintiffs, and that under the *Mercantile Law Amendment Act* (19 & 20 Vict. c. 97), s. 5, he had the right of an unpaid vendor to stop the goods *in transitu*.

Witnesses were examined on both sides. Evidence was adduced as to the usage of the *London Dry Goods Market*, from which it appeared that when a broker bought for undisclosed principals he was held responsible to the seller for the price of the goods in case the purchaser failed to pay, and that as a general rule he paid the seller for the goods on the prompt day before receiving the money from his principal.

Dalton stated in his evidence that when he obtained the second

delivery order from Messrs. *Carter* he was not aware that Messrs. *Brousson* had pledged the first delivery order to the bank. The evidence tended to shew that *Dalton* had sent his cheque for the goods to Messrs. *Carter*, and that they had received the same before twelve o'clock on the 18th of March, 1876.

Chitty, Q.C., and *Medd*, for the Plaintiffs:—

The Plaintiffs are entitled, as being *bonâ fide* holders for value of the first delivery order by indorsement from Messrs. *Brousson*. This order was lodged at the office in *Leadenhall Street* and acknowledged before *Dalton's* clerk had gone to the *Dock House* and obtained the warrant. The *Docks Company* are in the position of warehousemen who have received from the Plaintiffs a delivery order for goods in their custody, which they have acknowledged. That being the case, there is no vendor's lien for unpaid purchase-money which can affect the Plaintiffs' claims.

[On this part of the case they referred to *M'Ewan* v. *Smith* (1); *Lucas* v. *Dorrien* (2); *Withers* v. *Lyss* (3); and *Bentall* v. *Burn* (4).]

Further, the *Docks Company*, having notice of the Plaintiffs' title, should immediately have sent word to the *Dock House*. Had they done so, they would have prevented the issuing of the warrant to *Dalton*. They were, therefore, guilty of negligence, for the consequences of which they are liable. There was, moreover, a verbal promise given to the Plaintiffs' clerk that the warrant would be ready on the 20th of March. They are therefore estopped from disputing the Plaintiffs' title: *Knights* v. *Wiffen* (5). *Dalton* had no right whatever to the goods when he obtained the warrant and the second delivery order, and, having obtained it wrongfully, he cannot enforce it. He claims the right of stoppage *in transitu* under sect. 5 of the *Mercantile Law Amendment Act* (19 & 20 Vict. c. 97), but there is no authority to shew that that section has any application to the position of suretyship arising from the usage of trade: *Benjamin* on Sales (6).

The evidence as to the usage in the *London Dry Goods Market*

(1) 2 H. L. C. 309.
(2) 7 Taunt. 278.
(3) 4 Camp. 237.
(4) 3 B. & C. 423.
(5) Law Rep. 5 Q. B. 660.
(6) Page 691.

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cannot have the effect of depriving the Plaintiffs of their rights as holders for value of the first delivery order.

[They referred to *Fleet* v. *Murton* (1), *Humfrey* v. *Dale* (2), *Hutchinson* v. *Tatham* (3), and *Mollett* v. *Robinson* (4).]

Cookson, Q.C., and *Crossley*, for the *Docks Company*;

Davey, Q.C., and *Linklater*, for *Dalton*; and *Roxburgh*, Q.C., and *D. Sturges*, for Messrs. *Carter*, were not called on.

Judgment.

JESSEL, M.R.:—

The view I take of the case is this—that the custom of *London* is proved as regards this particular trade, that a broker who, as broker, buys for a principal, but without disclosing the name of his principal, is liable, according to the custom of this trade, for the price of the goods to the vendor in case the buyer does not pay. It follows that, as between the buyer and the broker, the broker is the surety of the buyer, the principal debtor. Whoever is liable to pay the debt of another, whether for value, as in the case of the broker who receives a commission for incurring liability, or gratuitously, as between himself and the person originally or primarily liable, is a surety; and I can understand no definition of surety which will not include a person in that situation.

Again, I take this to be settled law, that, as long as the vendor of goods remains in possession as vendor of those goods and is unpaid, he has a lien as vendor for the unpaid purchase-money. I take it that it is quite immaterial that the vendor has parted with the document, which does or does not, according to law, transfer a title to the goods. He may have given a bill of lading which passes the legal property in the goods, or he may have given a delivery order, which, though it does not pass the legal title or property in the goods, enables the person receiving it to acquire possession of the goods and acquire a title in that way, but whatever he has done in that respect does not destroy his right of lien as long as he keeps possession of the goods as vendor and in no other character.

That being the position of matters, Messrs. *Carter* were the

(1) Law Rep. 7 Q. B. 126.
(2) 7 E. & B. 266.
(3) Law Rep. 8 C. P. 482.
(4) Ibid. 5 C. P. 646.

unpaid vendors of the goods. Mr. *Dalton* was the broker who had sold the goods to Messrs. *Brousson* without disclosing the name of the principals, the purchasers, and consequently, at the time when the delivery order (for it was in this case a delivery order) was given by Messrs. *Carter* to Mr. *Dalton* before the prompt day, the day of payment, had arrived, he had no right to receive, nor had they any right to give, a delivery order merely as of right, but as a favour they might do so if they thought fit. They did so think fit, and although Messrs. *Brousson* had no right to claim the delivery order from Mr. *Dalton*, yet of course he might give it them as a favour, and he did so, they (Messrs. *Brousson & Co.*) representing to him untruly that they wanted a delivery order immediately with the view of at once shipping the goods. What they did was to pledge the delivery order at once with the *Imperial Bank*, and they thereby authorized the *Imperial Bank* to obtain delivery of the goods.

Now, what was the position of the *Imperial Bank?* They had a modified ownership in the goods, but they were not the actual owners. They were pledgees of the goods. They were armed with the delivery order, and they had a right, as I understand the practice of the *Docks Company* and the usage of the trade in the city of *London*, to require one of three things from the *Docks Company*. They might go to the *Docks Company* and say, "Here is our delivery order; deliver us the goods standing in the name of Messrs. *Carter*," who had given a delivery order. Of course, if nothing had intervened, that is, if there had been no stop and nothing to prevent the *Docks Company* delivering the goods, they would have delivered the goods; they would have been carted away, and there would have been an end of it. Or they might say to the *Docks Company*, "We do not want you to deliver the goods; we want you to hold them for us, and be our bailees (that is, instead of making actual delivery), and so to make a constructive delivery to us by entering them in our name in your books, by which we should become owners to the same extent as if they had been delivered to us, and you to be our warehousemen or bailees of the goods for us." Or they might have superadded to this second proposal a third thing: they might have said, "Besides entering our names in your books, give us a dock warrant, which will shew our title to

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the goods, and enable us to confer a title by indorsement on the buyer of the goods." Being in that position, they did, on Saturday, the 18th of March, 1876, take the delivery order to the *Docks Company*. Now, in the meantime—I am not speaking now to half an hour or so, this had happened on the Saturday morning—Mr. *Dalton* had paid Messrs. *Carter*, the vendors; he had heard that Messrs. *Brousson & Co.* had failed, and he was, therefore, very anxious to get the goods.

In this position of matters, what were the rights immediately after payment and before presentation of the order? As far as time goes, if it were material, I think the payment was made, that is, the cheque had left Mr. *Dalton's* office and gone to Messrs. *Carter*, before the delivery order was presented in *Leadenhall Street*. I think that is the fair result of the evidence. I am not sure that the matter is very material in the way I look at it. That being so, I take it, having regard to the terms of the *Mercantile Law Amendment Act* and to the justice of the case, that the lien of Messrs. *Carter*, the unpaid vendors, was a security which subsisted for the benefit of Mr. *Dalton*, the broker who paid the money, and therefore he could in their names have stopped the goods. Of course they (Messrs. *Carter*) could, on his behalf and at his request, have stopped the goods, or any person duly authorized by them, either immediately or by subsequent ratification, could have stopped the goods, and if this had been done before the delivery order was brought in, it is clear their title would have then destroyed the inchoate title of the bank. But supposing the payment was not made until after the delivery order was brought to the office (which I do not think is the result of the evidence), what would be the difference then? What is the effect of bringing the delivery order to the office? It seems to me it does not transfer the property in the goods. As I understand the course of business at the office in *Leadenhall Street*, the *Docks Company* do not accept a delivery order for the purpose of making themselves bailees, but merely for the purpose of sending down to the docks. Having three docks, they send down to the dock in which the goods are deposited, and at the warrant office in those docks it is seen whether there is a stop on the goods, and then, if there is no stop, the proper entry is made in the books, or the proper order is made for the

delivery out to the carter, or whoever it may be, and in that way, and in that way only, do the *Docks Company* become responsible to the persons who brought the delivery order as bailees of the goods; in other words, there is no delivery of constructive possession until the order gets down to the docks and is recognised by an entry in the dock books. That seems to me the effect of the evidence. It is not, therefore, for me to say what in any other case a Judge or Judge and jury may have thought to be the effect of what was done by the wharfinger or warehouse-keeper, but it is for me to say, sitting here as Judge and jury, what in my opinion is the result of the evidence. The result of the evidence is, I think, that there was no attornment. Consequently, even assuming that the effect of the evidence was that the payment was made after the delivery order was brought to the office in *Leadenhall Street*, still I think that the possession of the goods was never out of Messrs. *Carter*.

Now, what in fact was done was perhaps a little irregular, but in substance it amounted to no more than a stop on the goods. The clerk of Mr. *Dalton* signed on behalf of Messrs. *Carter* an order on the *Docks Company* to make out a dock warrant in the name of Messrs. *Carter*. This was done, and Messrs. *Carter* afterwards indorsed the dock warrant in pursuance of the request to send a second duplicate delivery order. The *Docks Company* acted on that, and transferred the goods to Mr. *Dalton*. I think the result would have been the same as long as they remained in Messrs. *Carter's* name, never having been transferred to the *Imperial Bank*. That being so, it appears to me—possession never having been delivered to the Plaintiffs either actual or constructive—that the vendor's lien not being discharged (for this purpose) by the payment made by Mr. *Dalton* to Messrs. *Carter*, the right to keep the goods for the vendor's lien remained in *Dalton*, and that the Plaintiffs have no title.

It is immaterial to me to consider whether they have or have not a case against the *Docks Company* for negligence. That is not the case made by this claim. The facts, as I understand them, are these: that the *Docks Company* received a delivery order in such time that if they had sent it in the ordinary course of business down to *St. Katharine Docks* it would have arrived there before the counter-order, as I may call it, from Mr. *Dalton*, or in the

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name of Messrs. *Carter*, and at least it would have arrived there within an hour, and if that had happened the possession would have been constructively changed by the entry in the book of the *Docks Company* at the docks in the name of the *Imperial Bank*. But by some mistake the messenger of the *Docks Company* took the order to the wrong dock, and consequently it was not actually acted on at all, because the stop or countermand arrived in time and prevented the change of possession.

Then it is suggested that there is a contract for value with the *Docks Company* by the *Imperial Bank*, on which they are entitled to sue. All that I have to say to that is, that that is not the statement of claim before me. Nothing of the kind is alleged; it is not an action for negligence at all, but an action for delivery of goods, and I do not intend by the judgment I am pronouncing to prejudice any such claim, if any such claim can be maintained, as to which all I can say is that I do not encourage the *Imperial Bank* to bring any such action, but in deciding this I do not intend to prejudice any such action if any such action should be brought. I do not think it is necessary, considering the form of the pleadings, to state that in the judgment.

Now, as regards Messrs. *Carter*, who have been made parties to the record, I have a few words to say. Messrs. *Carter*, I think, if they had known all the facts, and knew all I know about the matter, ought to have stopped the goods immediately, and I see no objection to their having asked for a warrant and indorsed the warrant, but it appears that their advisers thought afterwards that they had done wrong, and they wrote some letters on that assumption to Mr. *Dalton* and to the Plaintiffs, and it also seems that Messrs. *Carter* were made parties to the suit under some apprehension or misapprehension that they were liable in some way or other, or were necessary parties. I must say I do not see in what view they were necessary parties, or how they can be liable for anything; they are simply vendors of the goods, who received payment from the broker who was liable to pay for them, and indorsed a warrant to him. I see no reason whatever why they should be considered even formal parties to the suit. They had done nothing wrong. I cannot, because their legal advisers at one time seemed to be under the impression that they had, say that

they are liable to costs or otherwise. Therefore, in dismissing the action, as I do, I simply follow my usual rule, and make the costs follow the event.

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Solicitors for Plaintiffs: *Maples, Teesdale, & Co.*

Solicitors for Defendants: *Hacon & Turner; Wilson & Son; Linklater & Co.*

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Feb. 7, 8.

[1875 M. 145.]

Vendor's Lien—Stoppage in Transitu—Iron Warrants, Claim by Holders of—Usage of Iron Trade—Warehoused Goods—Transit—Apportionable Contract.

By the usage of the iron trade warrants for goods "deliverable (f. o. b.) to *A. B.*, or their assigns, by indorsement hereon," are considered to pass to the holders for value free from any vendor's lien.

The *P. B. Company*, manufacturers of steel rails, contracted with *S. & Co.*, iron merchants, for the sale of a quantity of rails to be rolled at their works, and to be delivered at intervals, payment to be made as to three-fifths at three days' sight, and as to two-fifths by buyers' acceptances at four months. On the completion of each portion of goods a warrant for the same in the above form was sent to *S. & Co.* with an invoice and drafts for the purchase-money, and the goods referred to in the warrants were stacked at the works. In the meantime *S. & Co.* pledged the several warrants, and indorsed the same to the Plaintiffs. Before the contract was completed, when only part of the goods were paid for, *S. & Co.* became bankrupt, and their acceptances were dishonoured. At that time part of the goods had been dispatched in waggons sent by order of *S. & Co.*, and were stored in a railway company's warehouse, addressed to the agents of *S. & Co.*, and part remained stacked at the works:—

Held, that, by the usage of the iron trade, as well as by the intention of the parties as shewn by their course of dealing, the Plaintiffs, as holders for value of the warrants, were entitled to the goods free from any vendor's lien:

Held, also, that even had the vendors been able to claim a lien on the undelivered goods, the transit was at an end as regarded those stored in the warehouse, and their right was gone:

Held, also, that the contract was apportionable, and that the vendors could not in any event have claimed any lien on that portion of the goods which had been fully paid for.

74 BD 44
11 QBD 7

THE Plaintiff company is a banking company in the city of *London*. Part of its business consists in making advances by

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accepting bills and otherwise to merchants and others against produce or manufactured goods.

At the time of the transactions hereinafter mentioned the Defendant company, the *Phœnix Bessemer Steel Company*, carried on business at *Sheffield*, and were manufacturers of *Bessemer* steel rails.

In August, 1874, the Defendant company contracted through their *London* agents for the sale to *Gilead A. Smith & Co.* of 5000 tons of *Bessemer* steel rails, which contract so far as material was as follows: "Sold for account of the *Phœnix Bessemer Steel Company* to Messrs. *Gilead A. Smith & Co.* 5000 tons *Bessemer* steel rails of sellers' usual good quality and make, at the price of £10 15*s.* per ton delivered free on board ships at *Liverpool*. The rails shall be drilled according to the custom of the trade, but should buyers elect to have them punched in the usual way, then the price shall be £10 10*s.* per ton, delivered free on board ships at *Liverpool*. Buyers to have the option of taking delivery f. o. b. *Hull* at a deduction of 5*s.* per ton. Payment shall be made for the rails in the proportion of 3/5ths net cash and 2/5ths by buyers' acceptance of sellers' drafts at four months. Said payments to be made as each 500 tons are inspected and ready for shipment in their respective months of delivery.

"Delivery shall be made in equal monthly quantities, in January, February, and March next, or at the rate of 1000 tons per month in November, December, January, February, and March next, as sellers elect. The rails to be stacked free of charge should buyers so direct . . .

"The rails to be guaranteed for six years from date of bills of lading . . .

"The rails to be subject to inspection at the works while making them or when made, and every facility shall be afforded to buyers' inspector for carrying out his inspection."

By a subsequent agreement the deduction in case *Gilead A. Smith & Co.* elected to take delivery of the steel rails at *Hull* was altered from 5*s.* per ton to 2*s.* 6*d.* per ton.

In December, 1874, the Defendant company had rolled above 400 tons of steel rails under the said contract, and applied to *Gilead A. Smith & Co.* for payment for the same. On the 16th of

December, 1874, *Gilead A. Smith & Co.* wrote to the Defendant company, "We beg to enclose a form of warrant which we would be obliged by your using for the rails now ready, returning the same to us completed with your invoice."

The warrant, which was printed with blanks, when filled up by the Defendant company was in the following form:—

"The undermentioned iron will not be delivered to any party but the holder of this warrant.

"*Phœnix Bessemer Steel Company, Limited.*

"No. 88. "Dec. 19, 1874.

"Stacked at the works of the *Phœnix Bessemer Steel Company, The Ickles, Sheffield.*"

"Warrant for 403 tons 2 qrs. 9 lbs. steel rails. Iron deliverable (f. o. b.) to Messrs. *Gilead A. Smith & Co.*, of *London*, or to their assigns by indorsement hereon."

The particulars of the rails included in the warrant were appended thereto with the words, "to be delivered free on board, *Liverpool.*" The warrant was signed by *W. Griffiths*, on behalf of the Defendant company, upon a threepenny stamp.

The rails were inspected by the engineer employed by *Gilead A. Smith & Co.* on their behalf under the contract, and on the 19th of December, 1874, he signed his certificate of inspection. On the 22nd of December, 1874, the Defendant company returned the warrant to *Gilead A. Smith & Co.* with an invoice in the following form:—

"Messrs. *Gilead A. Smith & Co., London.*

"Bought of the *Phœnix Bessemer Steel Company, Limited,* stacked on these works, to your order, to be delivered f. o. b. at *Liverpool* according to your instructions" (then followed the particulars of the rails and the price, namely £4231 16*s.*)

The Defendant company also sent a draft for £1692 14*s.* 5*d.*, being two-fifths of the invoiced price, which was accepted by *Gilead A. Smith & Co.* and returned. The remaining three-fifths of the invoice price, namely, £2539 1*s.* 7*d.* was by request of *Gilead A. Smith & Co.* paid by a draft at three days' sight instead of by net cash.

The Defendant company continued to roll rails in execution of

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their contract, and from time to time, in the early part of 1875, they filled in and signed nine forms of warrant similar to warrant No. 88, *mutatis mutandis*, of the following numbers and dates: No. 88, Jan. 15; No. 89, Jan. 25; No. 90, Jan. 25; No. 91, Feb. 2; No. 92, Feb. 8; No. 93, Feb. 13; No. 94, March 11; No. 95, March 19; No. 96, March 27; No. 100, April 29.

These warrants were stamped and signed by the said *William Griffiths* on behalf of the Defendant company and sent to *Gilead A. Smith & Co.*, together with invoices in a similar form to the one before-mentioned and certificates of inspection. The drafts of the Defendant company sent therewith on *Gilead A. Smith & Co.* for the two-fifths and three-fifths of the respective invoice prices at four months and three days respectively were accepted and returned by *Gilead A. Smith & Co.* to the Defendant company, who, in each case, wrote stating that they had credited *Gilead A. Smith & Co.* with the amounts in their books, and in letters accompanying the documents so sent they referred to the rails stacked on their works as being "stacked by your order." The whole of the bills drawn for the three-fifths of the invoice prices, and the first two of the bills drawn for the two-fifths of the invoice prices were duly met by *Gilead A. Smith & Co.* at maturity.

On the 8th of May, 1875, *Gilead A. Smith & Co.* requested the Defendant company to load all the rails rolled for their account and then stacked on the company's premises, and to forward them forthwith to *Liverpool* to the care of their agents, Messrs. *J. & W. Goffey;* and one of the partners in *Gilead A. Smith & Co., J. D. Phillips,* arranged with the manager of the Defendant company that waggons of the *Manchester, Sheffield, and Lincolnshire Railway* should be sent to the works to load the rails, and the goods manager of the railway was directed to send the rails when loaded to the care of Messrs. *Goffey, London and North Western Railway, Liverpool.*

The waggons were accordingly sent to the works of the Defendant company, who loaded a large part of the rails comprised in the said warrants. They were then conveyed from the works by the *Manchester, Sheffield, and Lincolnshire Railway,* and the *London and North Western Railway,* to the premises of the latter company

at *Liverpool*, addressed to Messrs. *Goffey*. The *London and North Western Railway Company* advised Messrs. *Goffey* of the arrival of the rails at *Liverpool* by advice notes, which stated that the goods remained for their order and were then held by the railway company, not as common carriers, but as warehousemen at owners' sole risk. The remainder of the rails were at the end of May 1875, still stacked at the works of the Defendant company.

Meanwhile *Gilead A. Smith & Co.* had applied to the Plaintiff company to open a credit for them upon 3000 tons of *Bessemer* steel rails, being part of the 5000 tons of such rails contracted for under the said contract, and it was agreed that *Gilead A. Smith & Co.* should draw upon the Plaintiff company against the warrants as received from the *Phœnix Bessemer Steel Works*, at £8 a ton, at four months date.

On the 5th of January, 1875, *Gilead A. Smith & Co.* indorsed and sent the warrant No. 88 to the Plaintiff company, who returned drafts for £3200 for acceptance. On the 16th of January, 1875, they indorsed and sent the warrant No. 89 to the Plaintiff company, who returned drafts for £4000 for acceptance; and the Plaintiff company made further advances on the warrants numbered respectively 90, 91, 92, and 93.

On the 10th of March, 1875, *Gilead A. Smith & Co.* opened a similar credit with *Robert Loder* against the remaining 2000 tons of steel rails contracted for under the said contract of the 27th of August, 1874, and he agreed to make advances to them at the rate of £8 per ton. They indorsed and sent to him from time to time the said warrants numbered respectively 94, 95, 96, and 100, and he accepted their several drafts against the said warrants.

On the 28th of May, 1875, one of the acceptances which *Gilead A. Smith & Co.* had given to the Defendant company was dishonoured. The Defendant company received notice of such dishonour on the 31st of May, 1875, and on the same day received a letter from the Plaintiff company, dated the 29th of May, 1875, giving them notice that the Plaintiff company were the holders of the warrants Nos. 88–93, and on the 1st of June, 1875, *Robert Loder* gave a similar notice with regard to the warrants indorsed to him.

On the 31st of May, 1875, the Defendant company telegraphed to the *London and North Western Railway Company* not to deliver

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to any one, without the authority of the Defendant company, any of the steel rails which had been carried or were being carried from their works.

On the 31st of May, 1875, *Gilead A. Smith & Co.* presented a petition for liquidation by arrangement to the *London* Court of Bankruptcy, and by order of the said Court they were subsequently adjudicated bankrupts.

On the 9th of June a resolution was passed for the voluntary winding-up of the Defendant company, and by an order of the Master of the Rolls, made on the 12th of June, 1875, the winding-up was ordered to be continued under supervision.

On the 2nd and 3rd of June, 1875, two bills were filed, one by the Plaintiff company, and the other by *Robert Loder*, to enforce their charges against the rails. Afterwards, by the order of the Court, the two suits were consolidated, and the bill of the Plaintiff company was amended by making *Robert Loder* co-Plaintiff. The Defendants to the amended bill were the *Phœnix Bessemer Steel Company*, their secretary and manager before liquidation, the partners in *Gilead A. Smith & Co.* and their trustee in bankruptcy, who afterwards disclaimed, and Messrs. *Goffey & Co.*, who were afterwards dismissed.

The bill prayed that it might be declared that the Plaintiff company had a first charge on the rails included in the said warrants Nos. 88 to 93 respectively, given by the Defendant company for the amount of the bills accepted by them, and that the Plaintiff *Robert Loder* had a first charge on the rails included in the warrants Nos. 94, 95, 96, and 100, for the amount of the bills accepted by him, and for consequential relief.

The Defendant company claimed a lien on the said rails as unpaid vendors.

By order of the Court, a receiver had been appointed of the rails on the premises of the *London and North Western Railway* at *Liverpool*.

Evidence as to the usage of the iron trade was adduced, to the effect that warrants in the form signed by the Defendant company had been known since 1846, and had been in general use in the trade since 1866, that the form had then been settled by counsel (1);

(1) Mr. Bovill, afterwards C. J., and Mr. Lloyd.

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that such warrants were for the purpose of distinguishing the goods as being stacked at the warehouse or wharf of the manufacturer, and that when they stated they were deliverable to the purchasers or their assigns by indorsement, it was understood in the trade that they were to be free from any vendor's lien for unpaid purchase-money, that they passed from hand to hand by indorsement, and conveyed to the holder a title to the goods, and that this was so well known that no notice was deemed necessary to be given by the holder to the maker of the warrant.

Argument.

Miller, Q.C., *Robinson*, Q.C., and *Horton Smith*, for the Plaintiffs:—

The Plaintiffs in this case were holders for value of the iron warrants. These were expressed to be deliverable (f. o. b.) to *Gilead A. Smith & Co.*, and their assigns by indorsement thereon. The evidence shews that by the usage of the iron trade, warrants in this form are considered to be free from any lien by the vendors. The Plaintiffs therefore are entitled to the whole of the rails, and the Defendant company is not entitled to any lien thereon for unpaid purchase-money: *In re Blakely Ordnance Company* (1); *Goodwin* v. *Robarts* (2).

The Defendant company may probably rely on the case of *Gunn* v. *Bolckow, Vaughan, & Co.* (3), where wharfingers' certificates of iron rails ready for shipment were held not to pass any title to the goods by delivery, and that no custom of trade could give them the effect of warrants or documents of title as against the vendors; but in that case Lord Justice *James* said: "Warrants are things warranting a wharfinger, or warranting somebody else who has possession of the goods to deliver them. The owner of the goods gives an authority to the person who is the bailee of the goods to deliver them. That is what is meant by a warrant. Such warrants are constantly dealt with, and if they are negotiable, they are properly and validly dealt with as a security." It is clear that the certificates in that case are wholly distinguishable from the warrants here. The cases of *Farmeloe* v. *Bain* (4) and *Dixon* v. *Bovill* (5) are also distinguishable.

(1) Law Rep. 3 Ch. 154.
(2) 1 App. Cas. 476.
(3) Law Rep. 10 Ch. 491, 499.
(4) 1 C. P. D. 445.
(5) 3 Macq. 1.

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The Plaintiffs, as holders of the warrants, are entitled to the goods free from any equities between the Defendant company and *Gilead A. Smith & Co.*, according to the principles laid down in the cases of *In re Agra and Masterman's Bank* (1), and *In re Blakely Ordnance Company* (2). In *Goodwin* v. *Robarts* (3), scrip of foreign countries undertaking to give the bearer a bond for the money advanced, with interest, was held to be a negotiable instrument transferable by delivery, and a *bonâ fide* holder for value with whom the scrip had been fraudulently deposited as a security by a broker, to whom the owner of the scrip had entrusted it, was held entitled to it free from any claim.

The Defendant company cannot claim any right of stoppage *in transitu* in respect of that part of the goods which were stored at the premises of the *London and North Western Railway Company* at *Liverpool*, for the railway company held those goods as warehousemen and not as carriers, and the transit was at an end: *Carr* v. *London and North Western Railway Company* (4). At any rate the Defendant company can have no lien on that portion of the goods which was wholly paid for.

Bagshawe, Q.C., and *G. C. Price*, for the Defendant company:—

The Plaintiffs can have no higher right than the Defendants *Gilead A. Smith & Co.*, and the latter having failed to meet some of their acceptances, the Defendant company are entitled to retain all the rails on their works, and also to exercise the right of stoppage *in transitu* as to those at *Liverpool*. They have negotiated the bills received from *G. A. Smith & Co.*, but the holders of the bills have proved in the liquidation, and received a dividend.

The rights of an unpaid vendor are the same as regards a subvendee as against the original buyer, unless he be precluded by the estoppel resulting from his assent expressed or implied to the sub-sale when informed of it: *Benjamin* on Sales (5). The Defendant company were never informed of the pledge to the Plaintiffs till after they had exercised their rights as unpaid vendors.

These warrants are not negotiable instruments, and the Defendant

(1) Law Rep. 2 Ch. 391.
(2) Ibid. 3 Ch. 154.
(3) 1 App. Cas. 476.
(4) Law Rep. 10 C. P. 307.
(5) 2nd Ed. p. 632.

company are not estopped by the form of the warrants: *Dixon* v. *Bovill* (1); *Mackenzie* v. *Dunlop* (2); *M'Ewan* v. *Smith* (3). No custom, even if proved, could make warrants in this form negotiable. The alleged custom is recent and uncertain. At best these warrants would be of no higher validity than dock warrants, which were the subject of discussion in the recent case of *Imperial Bank* v. *London and St. Katharine Dock Company* (4). Dock warrants have been held not to be negotiable: *Fuentes* v. *Montis* (5). Moreover, the Defendant company are manufacturers, and the Plaintiffs had notice of this. The Plaintiffs, therefore, ought to have inquired whether there was any vendors' lien subsisting. Other warrants to which the evidence related were either not manufacturers' warrants but warrants of third persons, as in the case of *Gunn* v. *Bolckow, Vaughan, & Co.* (6), or were warrants for goods stacked on a wharf and not at the works. The Defendant company's warrants were issued for rails on their works and not at a warehouse or wharf, nor under the custody of third persons.

In *Farmeloe* v. *Bain* (7) undertakings to deliver goods to a vendee's order were held not to estop the right of unpaid vendors to withhold delivery.

In the case of *In re Natal Investment Company* (8) it was held that the holders of debentures issued by a company payable to *C.*, or his transferees, "or the holder for the time being," could only prove on them subject to all equities between the company and *C.* That case was held to be distinguishable from that of *In re Blakely Ordnance Company* (9).

In the present case the warrant was not intended to deprive the vendors of their lien, and the delivery was not complete till the goods were actually shipped; there was no such delivery of possession so as to exclude the lien of the vendors: *Benjamin* on Sales (10). In *Crouch* v. *Crédit Foncier of England* (11) a custom of recent origin to treat certain debentures as negotiable instruments was held not to prevail against the general law merchant.

(1) 3 Macq. 1.
(2) Ibid. 22.
(3) 2 H. L. C. 309.
(4) *Ante*, p. 195.
(5) Law Rep. 3 C. P. 268; Ibid. 4 C. P. 93.
(6) Law Rep. 10 Ch. 491.
(7) 1 C. P. D. 445.
(8) Law Rep. 3 Ch. 355.
(9) Ibid. 154.
(10) Page 658.
(11) Law Rep. 8 Q. B. 374.

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The Defendant company have a clear lien in respect of that portion of the rails which was on the works at the time when *Gilead A. Smith & Co.* stopped payment. As to those stored at the warehouse of the railway company at *Liverpool*, we submit the vendors have the right of stoppage *in transitu*. It may be said that they were delivered to the purchasers, as they were entrusted to their agents, Messrs. *Goffey & Co.*, but the purchasers for this purpose can only be treated as the agents for the vendors carrying the goods to their ultimate destination, viz., on shipboard at *Liverpool*, so that the vendors' lien still subsists.

It is said that in respect of that portion of the goods which was wholly paid for, there can be no vendors' lien. But the contract cannot be apportioned, and if the lien exists as to part it must exist as to the whole.

Judgment.

JESSEL, M.R., after stating the facts, continued:—

The allegations of the Plaintiffs apply first to the whole of the iron rails or steel rails; and, secondly, to parcels of them. The *Merchant Banking Company of London* allege that by the custom of the iron trade, a warrant in this form, or substantially in this form, passes from hand to hand, and gives, and is supposed to give, a title to the goods free from any vendor's lien; that, according to the custom of the trade, these warrants are usually issued by the makers of iron and steel rails, though sometimes by merchants, and are generally issued in this form for distinguishing the goods as being stacked or placed at the wharf or warehouse of the maker, and they state they will be deliverable generally to the purchaser or his assigns by indorsement; and that warrants in that form are treated universally in the trade as being free from any claim by the vendors who have given the warrants in respect of the purchase-money whether paid or not. That is a part of the custom, and consequently they pass from hand to hand safely without any notice being given to the warrantor, that is the person who has given the warrant, because, as the witnesses say, it is unnecessary to give him notice, as he knows, according to the custom of the trade, that the warrant is a representation to the person taking it that there is no lien.

The Plaintiffs say that, the custom being so, the *Phœnix Bes-*

semer Company knew it; and the first question I have to decide is whether there was any such custom established to my satisfaction. I have heard a great deal of evidence, and it was established to my satisfaction that there was that custom in the iron trade, and it appears that when these warrants were introduced the particular form was settled with the assistance of eminent counsel. With the greatest possible deference to those counsel, I think the form might have been improved, and that it would have been better to have said on the face of the warrant that it was free from any vendor's lien; but we are all wise after the event; and in saying that I do not mean it to be inferred that I myself, if I had been advising instead of those very eminent counsel, should at that period have advised the insertion of any such words. The form was invented, I am told, somewhere about 1846, and certainly the practice grew general about 1866, and I think from that time till now we must consider it on the evidence as an established custom that any man who gives this warrant understands that it shall pass from hand to hand for value by indorsement, and that the indorsee is to have the goods free from any vendor's claim for purchase-money. He is not to be asked whether he has a claim or not; if he chooses to issue it in this shape he tells all the trade that they may safely deal on the faith of that warrant, and whether or not it becomes a negotiable instrument at common law as distinct from equity, is, to my mind, utterly immaterial. That is the custom, and as the man who issues such a warrant knows that custom it appears to me that the *Phœnix Bessemer Company* have issued these exactly as if they had said they were to be deliverable according to the custom of the iron trade, that is to say, to be deliverable "free from any vendors' lien," they being the vendors—to Messrs. *Gilead A. Smith & Co.*, or their assigns by indorsement. If those words were inserted, as I think it will be desirable in future they should be inserted, can anybody doubt that the *Phœnix Bessemer Company* by issuing the warrant in that form would be precluded in equity from afterwards alleging that they were unpaid vendors? But having given it as a statement on the face of the warrant that the holder for value by indorsement would have the goods free from the lien, and having given the warrant for the purpose of its being so dealt with, I think it is

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clear on general principles of equity that such a defence could not be set up; and I say in this particular case it is clear to my mind that they did give it for the purpose of so being dealt with.

That is an inference against the company, and my reason for saying so is this: Having imputed that knowledge of the custom to the Defendant company, what did they do? They issued with their first parcel of goods two documents, the one is an invoice, the other a warrant. The invoice contains every element which is required to make it an ordinary document of title on which the purchaser could obtain the goods: "Messrs. *Gilead A. Smith & Co.* Bought of the *Phœnix Bessemer Steel Company, Limited*, stacked in these works to your order, to be delivered f. o. b. at *Liverpool* according to your instructions;" and then follow the details of the steel rails. That is an ordinary document of title, an ordinary invoice sent by a vendor to a purchaser. But they gave *Gilead A. Smith & Co.*, at their request, at the same time, another document, the iron warrant, the thing which the trade want for the purpose of either raising money by pledging or selling, and that is a totally different thing. It is treated in a totally different way. It begins with these words, "The undermentioned rails will not be delivered to any party but the holder of this warrant." Surely that means they will be delivered to the holder; it never means we will keep them and not deliver them to anybody, but sell them for our own benefit and deliver them to the purchaser. The very form of the warrant shews the purpose. In my opinion, considering that they had already given a document of title which was quite clear and independent and satisfactory to the purchaser, this was something they were issuing for a different purpose. It then goes on, "stacked," &c., in the same way, we had "stacked" in the invoice; but the next words are, "Warrant for these rails deliverable (f. o. b.) to Messrs. *Gilead A. Smith & Co.* of *London*, or to their assigns by indorsement hereon." Does not that mean they are warrants for delivery, and is not the meaning of the thing itself on the face of it, although it may not destroy *per se*, standing alone, if it had been a single document of title, the vendor's lien, when you consider it is an additional document given at request, and that you must impute some purpose for giving two

documents differing in form at the same time, I say, is it rational to impute any other purpose than really the very purpose that it was given them for, namely, the purpose of pledging or selling, as I have no doubt it was? Therefore, I say, in this particular case I think the effect of the two documents and the mode of request is to shew that it was really intended by the vendors, and that is special in this case.

As to its being a company, they have no particular mind, no individual mind, but the intention (I can impute sense to a trading corporation) was that this additional document was given for that special purpose, and that there is a distinction in this case between giving that document alone—although I should have held that, from what I have already said, to be sufficient, because I should have imported into it the custom of the trade—yet giving the two documents together I think there is evidence here that it was intended to be used in the way it has been used; and, of course, if you give a person a document knowing he can use it in a particular way, and intending he shall use it in that particular way by obtaining money upon it, you cannot afterwards be allowed to say, as against persons from whom he has obtained money, that the person is not to have the benefit thereof? That, it seems to me, would be contrary to the most elementary principles of equity, and, therefore, on these two grounds I am in the Plaintiffs' favour, first, on account of the general custom of the trade, and, secondly, because I think you must impute to the Defendant company special notice and special knowledge that the warrant was intended to be used for some such purpose, and having that knowledge they issued the document in this particular form, for it is inconceivable for what purpose it could have been used except that for which it was actually used—including, of course, the selling as well as pledging the goods. I have in this case the distinction, that the company purposely issued a second document of title with a view of its being used for a special purpose. On those grounds I think the company are not entitled to set up in this case the vendors' lien at all against the Plaintiffs.

There are two more points, which of course will only arise assuming my conclusion is erroneous. The first point is this: The transit was dealt with in this way. Mr. *Phillips*, who was one of

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the partners in *Gilead A. Smith & Co.*, went to the *Phœnix Bessemer Works* and arranged with the manager, for reasons which are very simple, that he would send the waggons of the *Manchester, Sheffield, and Lincolnshire Railway Company* to fetch the rails away. In the ordinary course of events the *Phœnix Bessemer Company* would have sent them in the railway company's vans in their own names; and the reason why that ordinary course was departed from was, that he did not like the position of the *Phœnix Bessemer Company*, and he was afraid, as he told us, that if the waggons were sent to fetch the rails in the name of the *Phœnix Bessemer Company*, the railway company might say, We will detain the goods because you have left unpaid a large amount of charges on other goods we have carried for you, and therefore we will detain these goods to answer those charges. With a view to avoid that he suggested, and it was assented to, that the waggons should be sent in the name of *Gilead A. Smith & Co.* This was accordingly done, and then the *Manchester, Sheffield, and Lincolnshire Railway Company* took the goods to a depôt or warehouse of the *London and North Western Railway Company;* and on the evidence I am satisfied that the goods were deposited in the warehouses of the *London and North Western Company* as a warehousing company, which they are as well as a railway company. They were deposited in the names of *Goffey & Co.*, who were the agents at *Liverpool* of *Gilead A. Smith & Co.* There was, no doubt, an ultimate intention at some time or other to shift the goods, and, of course, as the *Phœnix Bessemer Company* were liable to deliver the goods free on board, it was not intended that they should escape from the pecuniary liability, but *Gilead A. Smith & Co.* might not have shipped them at all, or they might have sold them before shipment.

The question I have to decide is, was the transit at an end in law? There is no question at all that the goods were delivered at the warehouse in the names of *Goffey & Co.* as agents for *Gilead A. Smith & Co.;* they had got into the hands of the purchasers or their agents as such. Is there any law which says the transit was not at an end? I have heard certain very ingenious arguments suggested upon that. It was said, True it is they were delivered to the purchasers, but they are to be treated for this purpose as agents for the vendors carrying the goods on to the ultimate desti-

nation, the shipping port. That argument seems to me more ingenious than sound. There was in fact a new arrangement that the purchasers were to convey the goods to the shipping port on their own account; they were to get some payment, but it was no longer the vendors who were to convey, and the transit to the shipping port was only a possible transit. They did not know whether the goods would be ultimately shipped or not. They might have been sold, and, looking to the financial state of *Gilead A. Smith & Co.*, I think they would have been sold and turned into money long before they reached the shipping port if it had been possible.

Therefore, it appears to me, both in fact and in law, the transit was clearly at an end. This question, whether the transit was at an end by the delivery to the purchaser's agent, I admit, cannot be solved *a priori;* it neither follows, as a proposition of law, that because a purchaser sends his carts for goods and they are given to him in the cart, the transit is at an end, nor does it follow it is not; it is to be considered as a question of what in law is called a question for the jury, that is, a question of inference from known facts as to what the real intention of the parties was. Treating it in this way, in this particular instance, I am satisfied that the transit was at an end. That disposes of part of the case should my conclusion on the other part of it be erroneous.

The other portion of the case depends on this, was there a several payment for a severed portion of the goods in the sense that you can apportion the contract? If there was, then there was no vendors' lien in respect of that portion of the goods which had been actually paid for. Now, on that point my opinion is entirely in the Plaintiffs' favour.

It is said that the original contract was an entire contract. It was entire in a sense, and apportionable in a sense. It was entire in the sense that it was a contract for so many thousand rails to be delivered in monthly portions at an entire price. It was also an apportionable contract in the sense that there were provisions for delivery of monthly portions of a certain quantity, and for separate payments for those portions. The contract contained within itself a power of apportionment. The vendors did not, in fact, follow the contract in terms, although they did substantially,

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that is, the quantities delivered were not delivered at the exact times nor in the exact amounts which had been arranged, but substantially they were. On each occasion that they announced the quantity for delivery they sent a separate invoice. They made a separate price according to the contract, and they accepted payment of that price as being the payment for that portion of the goods.

It seems to me, therefore, that it is a case of several payments for several portions of goods, and that as regards those portions of goods which have been actually paid for, there is no vendors' lien whatever, even assuming my decision on the rest of the case to be erroneous.

These being the grounds of my decision, it appears to me unnecessary to consider the various judgments and authorities to which my attention has been called, and I am the more pleased at this because I cannot help feeling that as to several of them there is great difficulty in reconciling them with principle; as to others, there is great difficulty in reconciling them with one another; and as to the whole, the law on this subject is in a very unsatisfactory state, so that if it were necessary to consider them, I should be placed at very considerable disadvantage, because sitting here in an inferior Court I should be unable, however much I dissented from some of the doctrines laid down, to overrule them; and I should be placed in the difficulty of having to reconcile that which I consider the principle as far as possible with that which I found to be absolutely decided. As I have been able to decide the case on the grounds I have mentioned, I am relieved from this difficulty, and I need not say I rejoice in being relieved from it.

Solicitors for Plaintiffs: *Flux & Co.*

Solicitors for Defendant company: *Pilgrim & Phillips*, agents for *Watson & Esam, Sheffield.*

LEATHES *v.* LEATHES.

M. R.
1877
March 9.

[1877 L. 30.]

Custody of Deeds—Settled Estate—Tenant for Life and Remainderman.

A legal tenant for life of freeholds is entitled to the custody of the title deeds, and the Court will not interfere as between a tenant for life and remainderman, except where there is danger to the safety of the deeds if left in the hands of the tenant for life, or where the Court requires the deeds for the purpose of carrying out trusts relating to the property.

On an application by a tenant for life in remainder of settled estates for the title deeds to be deposited in Court:—

Held, that the tenant for life in possession was entitled to their custody.

Warren v. *Rudall* (1) commented on.

Statement.

THIS was a motion on behalf of the Plaintiff, who was tenant for life in remainder of a settled estate under a will, that he might be at liberty to deposit in Court the title deeds of the estate, and that they might be retained in the custody of the Court till the hearing of the action, when they might be secured for the benefit of the several persons interested in the estate.

The deeds had come into the Plaintiff's possession during the lifetime of his father, the testator, for whom he acted as solicitor.

The Defendant, the first tenant for life, claimed to be entitled to the custody of the deeds, but the Plaintiff alleged that he had long resided in *Australia*, also that, as there was a contest respecting the ownership of part of the estate, the Defendant might make use of the deeds by shewing them to those who had an adverse claim, to the prejudice of those entitled in remainder.

Argument.

Ince, Q.C., and *Chester*, in support of the motion:—

The case is one in which the Court will take the title deeds of the estate into its own custody. The Defendant, the first tenant for life, has long resided in *Australia*, and is not likely to take any interest in the settled estate. Then there is a contest as to the ownership of part of the estate, which is claimed by another family,

(1) 1 J. & H. 1. 6 Jur. N.S. 395

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and a serious injury might be done to the estate if the Defendant were to shew the title deeds to those who urge a hostile claim. The Court has in several cases refused to allow a tenant for life to retain possession of the title deeds when injury might result to the estate: *Stanford* v. *Roberts* (1); *Jenner* v. *Morris* (2). In *Warren* v. *Rudall* (3) Vice-Chancellor *Wood* laid down that, though the Court did not interfere as between a father tenant for life and a son remainderman respecting the custody of title deeds, yet in the case of a stranger tenant for life the Court would interfere.

Chitty, Q.C., and *Langworthy*, for the Defendant:—

It is a settled rule that the Court will not interfere with the custody of title deeds remaining with the legal tenant for life unless a special case can be made out to the contrary: *Garner* v. *Hannyngton* (4). Lord *St. Leonards* says: "There are *dicta* that every remainderman has a right in Equity to have the deeds brought into Court: *Reeves* v. *Reeves* (5); *Smith* v. *Cooke* (6). But nevertheless there is not a single decision that way, but the rule is settled the other": *Sugden*, Vendors and Purchasers (7). The reason why the tenant for life is the proper custodian of the deeds is that he is the person to defend the inheritance. In the present case there is no valid reason why the deeds should not be in the custody of the tenant for life, or for ordering them to be deposited in Court.

Judgment

JESSEL, M.R.:—

A legal tenant for life of freeholds is entitled to the custody of the title deeds as a matter of right, except in cases where he has been guilty of misconduct so that the safety of the deeds has been endangered, or where the rights of others intervene, and it becomes necessary for the Court to take charge of the title deeds in order to carry out the administration of the property.

In *Garner* v. *Hannyngton* (8) Lord *Romilly* held that "the legal tenant for life is *primâ facie* entitled to the custody of the title

(1) Law Rep. 6 Ch. 307.
(2) Ibid. 1 Ch. 603.
(3) 1 J. & H. 1, 14.
(4) 22 Beav. 627.
(5) 9 Mod. 129, 132.
(6) 3 Atk. 378, 382.
(7) 14th Ed. p. 446, n.
(8) 22 Beav. 627, 630.

6 Jur N.S. 397

deeds." The question came before the Court of Exchequer in *Allwood* v. *Heywood* (1), when the full Court held that it was but reasonable that the Plaintiff, who was legal tenant for life, should have the custody of the title deeds. There are many *dicta* to the same effect, including a passage in *Sugden's* Vendors and Purchasers (2).

The only case the other way is that of *Warren* v. *Rudall* (3), where the deeds were in Court, and Vice-Chancellor *Wood* stated the rule thus: "With respect to the title deeds, it is a settled doctrine that this Court never interferes as to the possession of deeds between a father tenant for life and a son entitled in remainder; but in the case of a stranger tenant for life the Court will interfere; and this is in fact a particularly strong case, because the deeds are in Court, and I am asked to deliver them out. The reversioner has no connection with the tenant for life; the title deeds must remain in Court." There is a *dictum* of Lord *Hardwicke* in *Pyncent* v. *Pyncent* (4) to the same effect; but it is quite contrary to law, for the mere fact of the reversioner being a stranger to the tenant for life has nothing to do with the question.

Now I come to consider what are the circumstances in which the Court will interfere. First, the Court will interfere when there is any danger to the safety of the deeds if left in the custody of the tenant for life; and, secondly, where the Court is carrying out the trusts of the property, and the deeds are wanted for that purpose. Beyond these cases the Court cannot go.

The case of *Stanford* v. *Roberts* (5) was referred to. In that case there was a pending suit affecting the estate; and, as I understand the case, the Lords Justices were of opinion that there was an actual duty to be performed by the trustees, and Lord Justice *James* observed: "This case does not appear to me to turn on the mere question of legal title. There is a pending suit which relates to these estates, and which is being actively prosecuted. The only question, then, is where, having regard to the purposes of the suit, the deeds can be most conveniently kept. The Vice-Chancellor has, in the exercise of his judicial discretion, held that it is most

(1) 1 H. & C. 745.
(2) Page 446, n.
(3) 1 J. & H. 1, 13.
(4) 3 Atk. 571.
(5) Law Rep. 6 Ch. 310.

M. R. 1877 LEATHES v. LEATHES. Judgment.

convenient to allow them to remain where they are, and with that discretion we shall not interfere."

The other case referred to was that of *Jenner* v. *Morris* (1). That was rather a peculiar case. A suit had been instituted for raising portions out of a settled estate. Pending the suit, the tenant for life took a number of the leases to *Paris*. He afterwards, under an order of the Court, brought the whole of the title deeds and leases into Court for the purposes of the suit. After the purposes of the suit had been satisfied and the portions raised by mortgage, he applied to have the title deeds and leases given up to him. This application was opposed by the mortgagees, and refused by Vice-Chancellor *Kindersley*. When the case came before the Court of Appeal Lord Justice *Knight Bruce* said: "I cannot, without the consent of the mortgagees, concur in an order for delivery of these documents to a tenant for life who on a former occasion has, without any necessity, taken a number of them out of the jurisdiction." Therefore the sole ground of his decision was, that the tenant for life had taken them out of the jurisdiction, and that in his opinion there was danger to the deeds if they remained in his custody. Lord Justice *Turner* did not agree, but by consent an order was made for the delivery of the deeds to the tenant for life upon his giving security for their safe custody, and for their production at reasonable times, and for their return into Court if ordered.

In the present case, the first reason in support of the motion that I have to consider is, that the tenant for life has for many years resided in *Australia*. That is no reason at all. Secondly, it is urged that there is a contest as to the ownership of a portion of the estate, and that the tenant for life might shew the deeds to the adverse claimants. There appears, however, no ground for such a suspicion. The motion must be refused.

It was arranged that the Plaintiff should give an undertaking to deliver up all the title deeds on oath to the tenant for life.

Solicitors: *Leathes & Maynard; Emmet & Son.*

(1) Law Rep. 1 Ch. 603, 606.

STEAD *v.* MELLOR.

M. R.

1877

March 12.

[1876 S. 121.]

Will—Precatory Trust—Beneficial Gift.

Testatrix gave all her personal estate to trustees upon trust, after payment of her funeral and testamentary expenses, debts, and legacies, to hold the residue "in trust for such of my nieces *A.* and *B.* as shall be living at my death, my desire being that they shall distribute such residue as they think will be most agreeable to my wishes." *A.* and *B.* both survived the testatrix:—

Held, that they took the residue for their own benefit.

Briggs v. *Penny* (1) distinguished.

Statement.

MOTION FOR JUDGMENT.

Ursula Crook, by her will, dated the 13th of May, 1872, appointed the Plaintiffs her executors, and, after making divers specific and pecuniary bequests, gave all her personal estate, except what she otherwise bequeathed by that her will, to the Plaintiffs, upon trust to convert the same into money, and, after payment of her funeral and testamentary expenses and debts, and the legacies other than specific given by her will, to hold the residue of the said moneys "in trust for such of my nieces, *Martha Paulton* and *Ursula Mellor Taylor*, as shall be living at my death, my desire being that they shall distribute such residue as they think will be most agreeable to my wishes."

The testatrix died on the 16th of January, 1876, leaving Mrs. *Paulton* and Mrs. *Taylor* her surviving.

The action was brought by the Plaintiffs, as executors of the will, to have the rights and interests of all persons in the residuary personal estate of the testatrix ascertained and declared; and the only question calling for a report was whether Mrs. *Paulton* and Mrs. *Taylor* were entitled to the residue beneficially, or as trustees; and, if as trustees, then who were the persons beneficially entitled thereto.

Argument.

C. Stewart, for the Plaintiffs.

(1) 3 Mac. & G. 546.

M. R.

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STEAD v. MELLOR.

Argument.

Cookson, Q.C., and *Caldecott*, for some of the next of kin:—

This case is governed by the decision in *Briggs* v. *Penny* (1), where the words were, "well knowing that she will make a good use and dispose of it in a manner in accordance with my views and wishes." The distribution is not to be to whom the donees may please, as in the case of *In re Bond* (2), but in accordance with the wishes of the testatrix. The uncertainty as to what those wishes may have been does not prevent a trust being constituted. The word "distribute" shews that the testatrix did not intend Mrs. *Paulton* and Mrs. *Taylor* to hold the property themselves.

Davey, Q.C., and *W. F. Lawrence*, for others of the next of kin:—

The circumstance of the gift being to Mrs. *Paulton* and Mrs. *Taylor* as joint tenants is an indication that they were not intended to take the property beneficially.

Russell Roberts, for the trustees of Mrs. *Taylor's* mortgage settlement.

Chitty, Q.C., and *Alfred Bailey*, for Mrs. *Paulton* and Mrs. *Taylor*, were not called on.

Judgment.

JESSEL, M.R.:—

I have often said that it is the duty of the Court in construing wills of personal estate to look at the whole will in order to ascertain the intention of the testator, not forgetting to apply general rules of construction where such are applicable, but always giving to the language of the instrument its literal meaning so far as the context allows.

I have been referred to the case of *Briggs* v. *Penny* as an authority for deciding that a trust is created. In that case Lord *Truro* laid down what he considered to be the general principle. That is, of course, binding on me, although the decision itself would not necessarily be so, even if the words in the case before me were identically the same: *Gibson* v. *Fisher* (3).

(1) 3 Mac. & G. 546.

(2) 4 Ch. D. 238.

(3) Law Rep. 5 Eq. 51.

Now all that Lord *Truro* said with respect to the principles which he deduced from the then state of authority was this (1): "I conceive the rule of construction to be, that words accompanying a gift or bequest expressive of confidence or belief, or desire or hope, that a particular application will be made of such bequest, will be deemed to import a trust upon these conditions, first, that they are so used as to exclude all option or discretion in the party who is to act, as to his acting according to them or not; secondly, the subject must be certain; and, thirdly, the objects expressed must not be too vague or indefinite to be enforced."

Lower down he says (2) that there is no real and substantial distinction between the case of a testator who intends to make known, or has previously made known, his views and wishes to the legatee, and the case of a testator who gives all his property to *A.* on trust, but never declares that trust. To this I respectfully agree. But beyond these general principles, I find nothing in *Briggs* v. *Penny* (3) to guide me to a conclusion in the present case. It was a decision on the particular words of a will. It has never been followed, as far as I know; at any rate I am not aware of any case in which words so vague and so indefinite have been held to create a trust. The words were, "well knowing that she," the legatee, "will make a good use and dispose of it in a manner in accordance with my," the testatrix's, "views and wishes." Lord *Truro* appears to have been of opinion that the words "well knowing" were equivalent to, if not synonymous with, the expression "in the fullest confidence," and that they were used in such a manner as to exclude all option or discretion. With all deference to his Lordship, that is a most unsatisfactory reason Why should the words "well knowing" bear any other than their natural meaning? No reason is given why they should. However, that is the decision.

Whether the case of *Briggs* v. *Penny* was rightly or wrongly decided (and I must not forget that it affirmed the decision of a very learned Judge, the Vice-Chancellor *Knight Bruce*), it is distinguishable from the present case, and as the words are not

(1) 3 Mac. & G. 554. (2) 3 Mac. & G. 556.
(3) 3 Mac. & G. 546.

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the same, and I am not bound to regard it as a binding authority on the construction of the particular will now before me, I am free to inquire what the testatrix did really mean, and unless I find in the will something equivalent to a declaration that the residuary legatees take as trustees, I must hold that they take a beneficial interest. The testatrix gives all her personal estate, except what she otherwise bequeathed by her will or any codicil thereto, to trustees upon trust to convert the same into money. It is clear that she knew how to create a trust. And then, after payment of her personal and testamentary expenses and debts and legacies, she directs her trustees to hold the residue of her money upon trust for her two nieces, her desire being that they shall distribute such residue, not "in accordance with my views and wishes," as in the case before Lord *Truro*, or "as they know will be most agreeable to my wishes," but "as they think will be most agreeable to my wishes." What is that but to make them judges of the mode of distribution, and place the residue at their absolute disposal?

But for the case of *Briggs* v. *Penny* (1) this case would not have been arguable. There must be a declaration that Mrs. *Paulton* and Mrs. *Taylor* take the residue for their own benefit.

Solicitors: *Field & Weightman; G. F. Parker & Locke; Walker, Son, & Field; Chester & Co.*, agents for *Bailey & Read, Bolton.*

(1) 3 Mac. & G. 546.

In re HOSKIN'S TRUSTS.

V.-C. M.

1876

Dec. 15.

1877

Feb. 9.

Trustees Relief Act—Liability of Trustees—Costs.

A married woman having, under a settlement, a general power of appointment by will, appointed the fund, in pursuance of the power, to be divided among five persons, and appointed executors. The trustees of the settlement paid the money into Court under the *Trustees Relief Act*, and the *cestuis que trust* presented a petition for payment out, establishing their right to the fund by evidence:—

Held, that the trustees should have paid the fund over to the executors of the will for distribution, and they were ordered to pay the costs; but, as the executors were the proper persons to present the petition, the trustees were exempted from payment of so much of the costs as were occasioned by the production of evidence by the *cestuis que trust*.

Statement.

BY a settlement, dated the 15th of July, 1836, made upon the marriage of *Philip Hoskin* and *Sarah Hoskin*, a certain sum of money to which *Sarah Hoskin* was entitled upon the death of a person therein named was assigned to trustees upon trust to pay the interest thereof to the husband and wife and the survivor of them, as therein mentioned, and after the decease of the survivor upon trust as to the capital and income thereof for the benefit of such children as they should have, and in default of children, then in trust for such person and persons, for such intents and purposes, and subject to such powers, provisoes, and declarations as *Sarah Hoskin*, by her last will and testament or any codicil or codicils thereto to be signed and published by her in the presence of and attested by two witnesses, should, notwithstanding her coverture, direct or appoint, and in default of such direction or appointment upon the trusts therein mentioned.

Sarah Hoskin made her will, dated the 23rd of January, 1860, and thereby, in pursuance of the power given to her by the settlement of July, 1836, gave and bequeathed various small legacies, and directed that the residue should be divided between five persons in manner therein mentioned, and she appointed *William Patching* and *Edward Reynolds* executors of her will, and she gave to each of her executors £10 as an acknowledgment of their trouble in her affairs.

V.-C. M. 1876-7

In re HOSKIN'S TRUSTS.

W. Patching renounced probate, and the will was proved by *W. Reynolds* alone.

The testatrix died in June, 1863, without having had a child, and *Philip Hoskin* died on the 25th of December, 1874.

Statement.

The fund, which amounted to £668, being divisible on the death of *Philip Hoskin*, the trustees of the settlement offered to pay it to the *cestuis que trust*, and a correspondence took place between the solicitors as to a release being given by the *cestuis que trust*, but some difficulty arose as to the proof of their title, whereupon the trustees, with the consent of the executors, paid the fund into Court under the *Trustees Relief Act*.

A petition was now presented by the *cestuis que trust* for payment to them of the money so paid into Court, to be divided among them in the proportions stated in the will, and evidence was gone into to prove their title to the respective shares.

Argument.

Bristowe, Q.C., and *Bardswell*, in support of the petition:—

The power given to the testatrix was a general power of appointment, and she executed the power in favour of five persons, and appointed executors. Under such circumstances, it was the duty of the trustees of the settlement to pay the fund over to the executor (the second executor having renounced), and he would have been the proper person to give the trustees a discharge and to distribute the fund. This was decided in *Re Philbrick's Settlement* (1), where, under similar circumstances, Lord *Romilly*, M.R., held that the executors, and not the trustees, were the proper persons to distribute the fund among the appointees, and that it ought to be paid over to the executors for distribution. If the trustees had paid the money to the executors, they would not have been liable even if the money had been afterwards lost: *Hayes* v. *Oatley* (2). Under these circumstances, the trustees were not justified in paying the money into Court, and ought to be ordered to pay the costs. This was done in *Re Woodburn* (3), because the trustees required proof of the title of the appointees, and in *Poligno's Mortgage* (4), because the money was paid into Court

(1) 34 L. J. (Ch.) 368. (3) 1 De G. & J. 333.
(2) Law Rep. 14 Eq. 1. (4) 32 Beav. 131.

without sufficient reason, and in *Re Cater's Trust* (1). In the latter case, the trustees, as in this case, required a release which they were not entitled to have. *In re Elliot's Trust* (2), decided by your Lordship, is the last of the same class in which the trustees were ordered to pay the costs, because they paid the money in for the mere purpose of escaping liability, when there was no reasonable doubt as to the performance of their trust.

Argument.

Glasse, Q.C., and *Yate Lee*, for the trustees of the settlement:—

The trustees in this case were the proper persons to distribute the fund. Property appointed by will under a general power was, before the passing of the Act 23 Vict. c. 15, held to be exempt from probate duty on the ground that the executor could not administer it: *Platt* v. *Routh* (3); and the statute which imposes the duty, by directing that it shall be paid by the persons having the management of the property, appears to recognise their obligation to distribute the property among the appointees. At any rate, the trustees should not be made to pay costs for their anxiety to see that the fund was paid over to the right parties. It was necessary that the appointees should prove their title to the fund, and it is shewn by the correspondence that the executor assented to the course the trustees have taken, and it may be added that they acted under legal advice in doing so.

Dunning, for the executor.

Bristowe, in reply.

Judgment.

1877. MALINS, V.C.:—

The *Trustees Relief Act*, under which this money has been paid into Court, is, no doubt, a very useful Act, and there are numerous cases in which it has been most beneficially acted upon, and frequently points of law have been decided in the most inexpensive mode, to the great advantage of the parties. It is, therefore, a most beneficial Act, but it is one which may be turned to great oppression if its powers are abused.

(1) 25 Beav. 361, 366.
(2) Law Rep. 15 Eq. 194.
(3) 3 Beav. 257; 6 M. & W. 756, 791; S. C. on appeal, *sub nom. Drake* v. *Attorney-General*, 10 Cl. & F. 257.

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In this case the fund, which is a very small one—only £668—has been paid into Court by these trustees, and I am sorry to find, from the statement made by the solicitors on each side, that the costs will amount to at least £100. Where parties hold trust funds of this nature, it is most important that, before any step is taken under the *Trustees Relief Act*, they should well consider whether it is really necessary to pay the money into Court.

What, then, is the statement of the case? Here is a settlement executed in 1836, under which certain trusts were declared of this money, but under which the lady, Mrs. *Hoskin*, had a general power of appointment over the fund, which is equivalent to the ownership of it; so that a person having a general power of appointment may, if he thinks fit, direct that the fund shall be assets for payment of debts, because the general power is the same as the ownership. In this case Mrs. *Hoskin* executed the general power by will, and appointed executors. Now, according to the law at that time, the executors could not do anything without first proving the will, and the executors could not obtain probate without paying the probate duty. On general principles, therefore, the general power of appointment being an ownership, and giving the executors power to obtain probate, they were the parties to pay debts in the first instance and to receive the money under the will, and they had power to give a discharge for any moneys paid to them by the trustees of the settlement. And when once paid to the executors, and a receipt obtained from them, although they misapplied the funds the next minute, the person having such receipt from them is entirely discharged from liability. Why, then, was not this money at once paid over to the executors, and divided by them between the persons entitled to it? Instead of that course being taken, there is a ridiculous correspondence between the parties about a release being given, when the money ought to have been handed over to the executors, who could have given a valid discharge for the money paid to them. Then it appears that two counsel were consulted upon the subject, but they raised untenable objections, notwithstanding that they had the decision of the Master of the Rolls to be guided by in the case of *In re Philbrick* (1). There the very point arose.

(1) 34 L. J. (Ch.) 368.

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A married woman had a general power of testamentary appointment over a trust fund, and she appointed the fund amongst certain persons, and appointed executors. The Master of the Rolls said: "Where the donee of a general power appointed the property to certain persons beneficially, the original trustees were bound to carry the appointment into execution; but if the donee appointed the property to trustees, those trustees were entitled to receive the property to be held upon the trusts declared by the donee; and when a married woman made a will in exercise of a power and appointed executors, inasmuch as she could only make her will by virtue of the power, and could only have appointed the executors for the purpose of administering the appointed property, she must be considered to have appointed the property to the executors as trustees. . . . By the appointment of executors, the duty of administering the fund was, in his opinion, taken away from the original trustees and committed to the executors, and the provisions of the 23 Vict. c. 15 rather confirmed this view than otherwise."

The Master of the Rolls also said, when referring to the case of *Platt* v. *Routh* (1), that the expression in the judgment that the executor could not have administered any part of the appointed property, only meant that, "but for the will exercising the power," the executor could not have administered.

Now that is a formal decision upon the point, and there is a still more formal decision on the same point in the case of *Hayes* v. *Oatley* (2). There there was a general power of appointment under settlement given to a married woman, who executed the power and appointed an executor. The trustees of the settlement paid the whole fund to the executor, and part of it, that is, £5000, which was applicable to the payment of the pecuniary legacies, was lost by him, but the Master of the Rolls held that the payment to the executor was proper, and that the trustees were not answerable for the loss, and the bill against the trustees was dismissed with costs. It was ridiculous to have instituted such a suit, and nothing could be more unfounded than the supposition that the trustees could be made to pay over again.

(1) 3 Beav. 257; 6 M. & W. 756, 791; S. C. on appeal, *sub nom. Drake* v. *Attorney-General*, 10 Cl. & F. 257.

(2) Law Rep. 14 Eq. 1.

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After these decisions, I cannot understand why there should have been such a hankering after a release. What could be the use of a release? If you have money belonging to *A. B.*, and you pay it to him, and take his receipt for it, that is the best release you can have; and in this case, if the trustees had paid the fund over to the executors, and had taken a receipt for it, that would have been the most complete discharge they could have required. I do not say that the solicitors in this case were guilty of anything improper, but there was an over-anxiety to get a release when the law was perfectly clear, and no release was required. It is surprising that the trustees did not become aware of the impropriety of paying this money into Court when the first step they took caused an outlay in costs of not less than £36 out of this small sum of £668. But the next step taken was to put in not less than sixty-nine folios of printed affidavits for the purpose of shewing who the parties were who were entitled to this fund. These were put in by the *cestuis que trust*, but what have they to do with that part of the case? The executors are the persons entitled to distribute the fund, and it is for them to ascertain who the parties are.

Under all these circumstances, the proper course would have been for the trustees to pay the money to the executors. Instead of that, the executors took no steps to obtain the money or to prevent the money being paid into Court.

But now that the fund is here, what is to be done? That the trustees were wrong in resisting payment is perfectly clear; and if this had been a petition by the executors, I should have had no hesitation in making the trustees pay all the costs, but the petition is by the *cestuis que trust* under the will, and by this course they have, to a certain extent, waived their strict right, and by putting in all these affidavits the amount of costs has been increased beyond what the trustees would otherwise have had to pay. Mr. *Bristowe* suggested that the case might be treated, with regard to costs, as if this had been the petition of the executors to have the money paid out to them; but I would rather make an end of the matter by fixing the amount of costs at once. Therefore, in order to relieve them of the costs occasioned by the petition having been presented by the wrong parties, I will make an order that the costs of the petition (other than the costs of the evidence

of the beneficiaries in support of their title) be paid by the trustees. The costs of the beneficiaries of proving their title, and the costs, charges, and expenses of the Respondent *Reynolds* as executor of Mrs. *Hoskin*, to be paid out of the fund. The legacy duty to be repaid to *Reynolds*, and £10 legacy to him as executor. The residue of the fund to be divided into five parts, according to the interests set out in the petition.

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Solicitors: *Burton, Yeates, & Hart; Brownlow; Merediths, Roberts, & Mills.*

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V.-C. M. 1877 *March* 2.

[1872 B. 287.]

Practice—Right to require a Jury—Several Defendants—Rules of Court, 1875, *Order* XXXVI., *rr.* 3, 26.

Where there are two or more Defendants to an action or suit, one of them alone, in opposition to or without the concurrence of the others, is not entitled, under Rules of Court, 1875, Order XXXVI., rule 3, to require the action to be tried before a jury.

Order XXXVI., rule 26, gives the Court a discretion in all cases of fraud, or such as raise questions which, before the *Judicature Act* came into force, were properly within the jurisdiction of the Court of Chancery, to order them to be tried without a jury, and the Court is not bound in such a case to allow a jury at the instance of a Defendant.

Statement.

THIS was a motion by the Plaintiff on suit, who was a shareholder and debenture holder in the *Canadian Oil Works Corporation*, asking for an order that, notwithstanding a notice given by one of the Defendants, Sir *J. D. Hay* (one of the directors of the company), on the 18th of April, 1876, the issues of fact, if any, arising in the cause might be ordered to be tried before the Vice-Chancellor without a jury, or otherwise that all necessary and proper instructions might be given for the trial of such issues between the Plaintiff and the said Defendant.

The Plaintiff had applied for and was allotted twenty shares and twenty debentures in the company, having, as he alleged, made his application on the faith of representations contained in a prospectus issued by the directors, some of which he alleged to

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be untrue and fraudulent on the ground that the directors had issued the prospectus without making any inquiries as to the truth of the representations.

The bill, which was filed on the 24th of September, 1872, prayed that it might be declared that the Plaintiff was entitled, by reason of the misrepresentations contained in the prospectus, to have the contract entered into by him for the purchase of the twenty debentures and the twenty shares rescinded, and to have his name removed from the list of shareholders, and also sought to make the directors, who were Defendants to the bill, jointly and severally liable to repay the sums paid by him, with interest, deducting certain sums of money which had been returned to him.

By reason of delays arising from amendments to the bill and other causes, the pleadings were not completed till the 18th of May, 1874, and in August in the same year the first steps were taken to prepare the evidence.

In the meantime an action of *Charlton* v. *Hay* had been commenced by a shareholder in the company against the directors, based upon the same state of facts, and all further steps in the present suit were postponed till that action was tried. The trial of *Charlton* v. *Hay* took place in 1875, and, after lasting fourteen days, the jury were unable to agree, and were discharged without a verdict. The present Plaintiff then proceeded to prepare his case by taking the evidence of certain Canadian witnesses by affidavit, and on the 24th of January, 1876, before the whole of these affidavits had arrived in *England*, a summons was taken out for leave to file a replication, and to continue and conclude the cause in the same manner that it would have been continued and concluded in the High Court of Chancery if the *Judicature Act* had not passed.

An order was ultimately made directing the Plaintiff to file a replication by the 3rd of March, and giving till the 5th of March to file the Canadian affidavits. This was accordingly done, and on the 12th of April, 1876, the Plaintiff served notice of trial of the cause before the Vice-Chancellor alone.

All the Defendants, who were the directors, made separate defences to the bill.

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On the 18th of April, 1876, Sir *J. D. Hay* gave notice, through his solicitors, of his desire to have issues of fact tried before a Judge and jury in accordance with Order XXXVI., rule 3, of the Rules of the Supreme Court.

None of the other Defendants gave any intimation of their wishes as to the mode of trial.

Statement.

On the 8th of June, 1876, Sir *J. D. Hay's* solicitors took out a summons for the appointment of special examiners to cross-examine the Canadian witnesses. But this summons was ultimately abandoned.

Mr. *Eastwick*, another Defendant, and also a director, after having made some applications before Vice-Chancellor *Bacon*, to whose Court the cause had been in the meantime transferred, as to taking the evidence on the 18th of December, obtained an order from the Lord Chancellor to re-transfer the cause to the Court of Sir *Richard Malins*. This order was made in the presence of, and without opposition from, the solicitors of Sir *J. D. Hay*.

The Plaintiff took no notice of the notice of the 18th of April, 1876, and on the 12th of February, 1877, Sir *J. D. Hay's* solicitors had the cause marked for trial by jury, and made up the record, and tendered the pleadings, together with a certificate of having done so, to the Associate of the Queen's Bench, to set the cause down for trial at the foot of the list. He, however, declined to accept the cause until issues of fact were settled.

The Plaintiff thereupon served the notice of the present motion on Sir *J. D. Hay* alone, the other Defendants being treated as not being affected by it.

Argument.

Romer, for Sir *J. D. Hay*, took a preliminary objection that the notice of motion ought to have been served on the other Defendants.

Higgins, Q.C., and *Ingle Joyce*, in support of the motion:—

There is no ground for the preliminary objection. No other Defendant has given notice of requiring a jury, and therefore they must now be assumed to have acquiesced in the mode of trial proposed by the Plaintiff.

Then with regard to the substance of the motion, Order XXXVI,

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rule 3, does not apply where there are several Defendants. Moreover, the case is clearly within the discretion allowed by Order XXXVI., rule 26. It was an old Chancery suit instituted before the passing of the *Judicature Act*, and the subject-matter of the suit being fraud, is clearly one which before that Act would have brought the case within the jurisdiction of the Court of Chancery. The cause is therefore one which, if commenced subsequently to the Act, would have been properly brought in the Chancery Division, and the case is brought within *Swindell* v. *Birmingham Syndicate* (1), and the distinction pointed out in *Clarke* v. *Cookson* (2) between cases in which a jury was a matter of right and the contrary. In *West* v. *White* (3), which came before the Court on the 25th of January last, the same principle was clearly recognised, and it was admitted that a trial by jury was not a matter of right where before the *Judicature Act* the proper remedy would have been in the Court of Chancery. *Clarke* v. *Cookson* was a creditor's suit for administration, in which the debt was disputed. In such a case before the Act, the suit would have stood over to allow the question of debt or no debt to be tried at common law. It was therefore a question which before the Act would have gone to a jury. These cases all shew that under rule 26 of Order XXXVI. the Chancery Division has an absolute discretion as to the trial of all cases of seeking relief on equitable grounds. An additional reason for not trying the cause before a jury is, that part of the evidence, viz., that of the Canadian witnesses, is on paper.

Romer, for Sir *J. D. Hay*:—

It cannot be inferred from the fact of the other Defendants not giving notices requiring a jury that they approved of a trial before the Judge alone. Any notice by them would have been superfluous when one Defendant had exercised the right of requiring a jury.

[MALINS, V.C.:—If I allow this case to go to a jury, it will follow that every case charging fraud must, if a Defendant requires, be heard before a jury.]

(1) 3 Ch. D. 127. (2) 2 Ch. D. 746.
(3) 4 Ch. D. 631.

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A jury is the proper forum to try questions of fraud such as this. Order XXXVI., rule 3, gives an absolute right to a Defendant to have a case tried before a jury, subject only to special circumstances controlling the exercise of the right. This case is one purely of fact. It only sounds in damages, but the reputation and character of the Defendants are at stake, and they prefer to have the verdict of a jury on that subject: *Clarke* v. *Cookson* (1) and *West* v. *White* (2) are clear authorities for the application of the rule in such a case.

Judgment.

MALINS, V.C.:—

The object of this application is to deprive Sir *J. D. Hay*, a Defendant in the suit, of the right to have this case tried before a jury. The case set up by the bill is, that the Plaintiff, Mr. *Back*, was wrongfully induced to take the shares and debentures of the *Canadian Oil Works Corporation*. He invested his money in them and has lost it, having been induced, as he says, to make the investment by the fraud and misrepresentation of the directors contained in the prospectus issued by them. He therefore files this bill against them, by which he seeks to make them personally liable to recoup his loss. The bill was filed in September, 1872. Afterwards an action was commenced by a Mr. *Charlton*, who was in a similar position, to recover back the money he had lost by taking shares in the company. The trial lasted fourteen days, but the jury were unable to agree, and were at last discharged. Neither party having succeeded in that action, Mr. *Back* elects to go on with his suit.

Now it appears that only one Defendant out of several asks for a jury; and a preliminary objection is made to the motion that the other Defendants ought to have been served. But I dispose of the objection thus: There are four Defendants who have not given notice that they desire a jury. I therefore assume that they do not require that mode of trial, and I think, therefore, that they need not be served with this motion. But Sir *John Hay* has given notice that he requires a jury, and the question is, whether he has such an unqualified right to a jury that he is entitled to

(1) 2 Ch. D. 746. (2) 4 Ch. D. 631.

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insist upon having one notwithstanding that the other Defendants do not require it. Mr. *Romer's* argument would go to this, that every case of fraud must now be tried before a jury if any Defendant requires it. If this is so, I think it is a pity that the *Judicature Act* did not contain an express enactment to that effect. But it is argued that rule 3 of Order XXXVI. makes a jury a matter of absolute right. That many cases are proper for a jury, I agree, and *West* v. *White* (1) was such a case, being a mere question whether some cement works were a nuisance. The Court of Chancery had formerly no exclusive jurisdiction in such a case, and under the old practice it might properly have gone before a jury. But questions of fraud have always been considered to be peculiarly within the jurisdiction of the Court of Chancery.

Now the 26th rule of this Order provides that "The Court or a Judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the Act could, without any consent of parties, be tried without a jury." This is conclusive that the rules do not entitle a party to require an action to be tried by a jury where he could not have required it previously. It is true that this rule is not imperative, but all doubt as to its meaning is set at rest by the 26th rule, which gives the Court or a Judge power, subject to the previous rules, to direct the mode of trial or hearing.

Now this is a common ordinary Chancery suit to rescind a contract on the ground of fraud and have the money paid by the Plaintiff returned; and if I acceded to this application, it would follow that in every case where a man is charged with fraud he has an absolute right to have the question whether he has committed the fraud submitted to a jury. But I do not think that was the intention with which the new rules were framed, and I should be sorry if the Chancery Division were now considered incompetent to try without a jury questions which have in past times been tried by a Judge sitting alone.

That is my interpretation of these rules; and I think that my view is not without authority. *Swindell* v. *Birmingham Syndicate* (2) is a case very like this; and the Lord Justice *Mellish*

(1) 4 Ch. D. 631. (2) 3 Ch. D. 127.

there says (1): "I also agree with the Lord Justice that this is not a case in which special leave to appeal ought to be given, for the case is essentially a Chancery one, and the Court has a discretion whether there shall be a trial by jury."

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With those observations I entirely agree. If there is a case which before the *Judicature Act* could only be tried before a jury it would have to be so tried still. But cases of fraud are peculiarly within the jurisdiction of this Court; and as I have a discretion under the 26th Order, I will exercise it by directing this suit to be tried before myself sitting alone.

As to the preliminary objection, I think that it was only necessary to serve the particular Defendant who expressed his desire for a jury. It would be a great hardship if the case were otherwise; but I think it is not necessary to serve the other Defendants, and therefore I disallow the preliminary objection.

Solicitors: *W. H. Thompson; Gedge, Kirby, & Millett.*

PILLEY *v.* BAYLIS.

V.-C. M. 1877 *March* 8.

[1875 P. 184.]

Practice—Trial by Jury—Discretion of Judge—Rules of Court, 1875, *Order* XXXVI., *rr.* 3, 26.

The Plaintiff filed a bill in the Court of Chancery before the *Judicature Act* for specific performance of a contract. He then amended his bill, claiming damages against one of the Defendants for alleged misrepresentation of authority, and set his cause down at the Associates' Office for trial by Judge and jury:—

Held, that the Plaintiff had no absolute right in such a case to a trial by jury; and directions were given under Rules of Court, 1875, Order XXXVI., rule 26, that the issues of law and fact should be tried in this Court without a jury.

Statement.

THIS bill was filed on the 28th of October, 1875, before the *Judicature Act* came into operation, praying that the Defendants, who constituted a firm of solicitors, might be decreed specifically to perform certain agreements concerning the *Basinghall Hotel* entered into by them with the Plaintiff; and either to procure

(1) 3 Ch. D. 133.

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for the Plaintiff a renewal of the lease of the hotel, or to repurchase the same. The Plaintiff amended his bill, praying in the alternative that if *Pearce*, who had entered into the contract for himself and the other Defendants, had no authority he might be decreed to be liable to the Plaintiff in damages for representing that he had such authority, and the Plaintiff claimed damages accordingly. The Plaintiff then entered his action for trial with the Associates of the Court of Exchequer, in pursuance of a notice published with the signature of the Chief Registrar in Chancery (1).

A motion was now made on behalf of the Defendants that this cause might be heard by his Lordship, Vice-Chancellor *Malins*, without a jury, instead of being tried in the Exchequer Division by a special jury, pursuant to notice given by the Plaintiff.

Argument.

Glasse, Q.C., and *Henderson*, for the Defendants, in support of the motion:—

This being a bill for specific performance of a contract, the matter is one which, before the *Judicature Act*, was peculiarly within the jurisdiction of the Court of Chancery, and by that Act the trial of all such matters is assigned to the Chancery Division. The Plaintiff, having properly set down his cause in this Court, cannot now withdraw, and transfer it to the Exchequer Division. The Plaintiff wishes to have his cause decided by a special jury on the ground that he has amended his bill, and now prays for damages against one of the Defendants. The case of *Swindell* v.

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(1) In actions assigned to the Chancery Division, when the Plaintiff, under Order XXXVI., rule 3, of the Rules of the Supreme Court, gives notice of trial before a Judge and jury, the action is to be entered for trial with the Associates instead of with the Chancery Registrar. Where, after the Plaintiff has given notice of trial in any other manner, and has set down the action in the Chancery Division, the Defendant has, under the provisions of the same rule, given notice that he desires to have the issues of fact tried before a judge and jury, the action will be marked in the Cause Book "Jury trial at Defendant's instance," on the request of the solicitor for either party, and on the certificate of such solicitor that such notice has been duly given within the time, or extended time, referred to in rule 3.

Actions which have been so marked will be added by the Associates to their list of actions for trial, upon the solicitor for either party bringing to them the certificate of the Chancery Registrar in the form given below, annexed to the statement of claim. Such actions will be placed in the list in the order in which they are entered with the Associates.

Birmingham Syndicate (1) has settled the practice that, in all actions which, before the *Judicature Act*, could only have been brought in the Court of Chancery, the High Court has now the same discretion as the Court of Chancery formerly had, whether there shall be a trial by jury. The Plaintiff cannot of his own mere will transfer his action to a Common Law Division without the sanction of this Court. In such a case as this the parties have no absolute right to a trial by jury. It must be left to the discretion of the Judge whether the issues of fact shall be tried before this Court without a jury, or be sent for trial by a Judge and jury in the Common Law Division; that is provided for by Order XXXVI., rule 26.

In *Sykes* v. *Firth* (8th day of February, 1877) your Lordship decided a case very similar to this, by refusing to send the questions of fact to be tried by a jury. There an application was made for the express purpose, but in this case the Plaintiff has, without any sanction, set his action down with the Associates of the Exchequer Court. This he has done in consequence of a recent notice issued by the Chief Registrar in Chancery (2); but that notice could never have been intended to enable a Plaintiff at any stage of the proceedings to remove his case from the Court in which his action is properly brought. The case of *Warner* v. *Murdoch* (3) is a decision that a trial by jury cannot be had before a Judge of the Chancery Division, and that an action to be tried by a jury must be set down before one of the Judges of the Common Law Divisions; but in that case the Master of the Rolls had previously decided that it was a case which ought to be tried by a jury. There is no question of fact in this case that cannot be better tried before a Judge than by a jury.

Higgins, Q.C., and *Northmore Lawrence*:—

The Plaintiff has an absolute right under Order XXXVI., rule 3, to choose what form of trial he thinks best adapted to this case. That is decided by *Sugg* v. *Silber* (4), where, though it was admitted that the case could be better heard before the Judge him-

(1) 3 Ch. D. 127.
(2) See note, *ante*, p. 242.
(3) 4 Ch. D. 750.
(4) 1 Q. B. D. 362.

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self, it was held by the Queen's Bench Division that the Defendant could not be deprived of his option to give notice under Order XXXVI., rule 3, requiring a trial by jury; and Vice-Chancellor *Bacon* followed that decision in *West* v. *White* (1), and said the parties could not be deprived of their statutory right to trial by jury.

When the Plaintiff first filed his bill the prayer was simply one for specific performance of a contract, but he has since found it necessary, from subsequent information, to amend his bill. The first question to be tried is, whether or not there was an agreement by an authorized agent, and if there was no authority the bill asks for damages. It has, therefore, now become desirable that this question should be tried by a jury, and the Plaintiff has adopted the mode directed by the Registrar's notice, and has set his action down at the Associates' Office. Since the decision in *Clarke* v. *Cookson* (2), and in *Warner* v. *Murdoch* (3), that there can be no trial by jury in the Chancery Division, this was the only course the Plaintiff could have pursued. The case now resolves itself into an issue of fact, and that can be better tried by a jury. We should have no objection to a trial before a Judge of the Chancery Division, but we think a jury is indispensable. *Swindell* v. *Birmingham Syndicate* (4) was the reverse of this case. There the application was by the Defendants, and the questions of law and fact were so mixed that the case could only be properly tried by a Judge in the Chancery Division.

Judgment.

MALINS, V.C.:—

In the first place, this is a bill as against two of the Defendants for the specific performance of a contract, and as against the third Defendant it is an action for damages. The bill having been filed in the Chancery Court, the proceedings were carried on in the regular way until the Plaintiff seems to have made up his mind that he would like to have the case tried before a Judge and jury, but how that is to be done in a case for specific performance is beyond my comprehension. However, entertaining that desire, he goes to Order XXXVI., rule 3, which is in these words: "Subject

(1) 4 Ch. D. 631.
(2) 2 Ch. D. 746.
(3) 4 Ch. D. 750.
(4) 3 Ch. D. 127.

to the provisions of the following rules, the Plaintiff may, with his reply, or at any time after the close of the pleadings, give notice of trial of the action, and thereby specify one of the modes mentioned in rule 2; and the Defendant may, upon giving notice within four days from the time of the service of the notice of trial, or within such extended time as a Court or Judge may allow, to the effect that he desires to have the issues of fact tried before a Judge and jury, be entitled to have the same so tried." Then the second rule states this: "Actions shall be tried and heard either before a Judge or Judges, or before a Judge sitting with assessors, or before a Judge and jury, or before an official or special referee, with or without assessors."

If there had been nothing but these rules it would give colour to the contention of the Plaintiff, that he has an absolute right to determine by what mode his action shall be tried, but the rules must be taken and construed together, since the third rule is made subject to the provisions of the following rules, and one of the following rules, that is, the 26th, is in these terms: "The Court or a Judge may, if it should appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the Act could, without any consent of parties, be tried without a jury." Now that I read as a general provision that in any case where it should appear desirable to try any question of fact, or partly of fact and partly of law, the Court or a Judge may direct a trial without a jury. Then what is the case I have before me? A bill for specific performance of a contract is a branch of business that was always within the jurisdiction of Chancery, and is specially allotted to the Chancery Division of the Court by the *Judicature Act*. If I refuse to accede to this application the result will be that every Plaintiff in a suit for specific performance having a desire that his action shall be tried before a Judge and jury has only to take advantage of the order or notice just issued with the signature of the Chief Registrar, to go and enter his action for trial with the Associates of the Court of Exchequer instead of with the Chancery Registrar, and the action will then be tried by a Judge and jury, and by that means the whole cause will be transferred from the Chancery Division to the

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Common Law Division. That appears to me so absurd that I cannot accede to it. There is, no doubt, some difficulty arising from the late decision of the Court of Appeal in the case of *Warner* v. *Murdoch* (1), which decided that, according to the true construction of the *Judicature Act*, 1873, and the Rules of Court, a trial by jury cannot be had before a Judge of the Chancery Division, but the action must be set down in the general list to be tried before one of the Judges of the Common Law Divisions; but I do not think that case has any application to this, because there it had been decided that it was a proper case to be tried before a jury, and the application was that the action might be set down to be heard by the Master of the Rolls himself with a jury. The question, therefore, was whether the case was to be tried by a Chancery Judge with a jury or by a Common Law Judge and jury. In this case no order has been made that the cause shall be tried before a Judge and jury, and it appears to me that nothing is more dangerous for both parties than that they may be at liberty in this off-hand way, without settling what issues should be tried, to run off and take such a course as this, and to have a case of such a nature as the specific performance of a contract tried by a Judge and jury. What can be more sensible than the old rule, that all business of this particular kind should be tried in the Chancery Division? And what stands in the way of it? There cannot possibly be an absolute right in either party to have such a case tried by a jury, and all that the new procedure amounts to is that the parties have the privilege in certain cases to have a trial before a jury, and my opinion is that, as this description of business is peculiarly within the jurisdiction of this branch of the Court, a Plaintiff is not at liberty at his own mere fancy to remove the case from this Court in order to have it tried before a jury.

Now as to this case, the Plaintiff, by his amended bill, has alleged that one of the Defendants, *Pearce*, took upon himself to represent that he had the authority of his partners to enter into the contract, when, in fact, he had no such authority. If it should be proved that he has done so, then the Court will award damages against him; but there is no difficulty in this Court deciding that

(1) 4 Ch. D. 750.

question as well as a Judge and jury. It is a most dangerous principle that any party who wishes to have a jury should be able to go off to the Associate and enter his action there for a trial with a jury. It would take away entirely the jurisdiction from the Chancery Division, which is the only Court having jurisdiction over business of this particular nature. I am informed by Mr. *Leach* that the notice published as to the setting down actions with the Associates is not an order, but only a notice. It was discussed by the Master of the Rolls, within whose province these matters more particularly rest, and with the Associates and the Chancery Registrars, and the notice was then issued.

Now, therefore, this being an action or bill or suit which, before the *Judicature Act*, could have been tried in this Court without a jury, it falls within the rule I laid down in *Sykes* v. *Firth*, which case I followed in *Back* v. *Hay* (1).

The motion must, therefore, be acceded to, and an order must be made that the cause be heard before me without a jury, instead of being tried in the Exchequer Division by a special jury.

As to the costs, I think that the Plaintiff was probably misled by this notice of the Registrar, and I shall, therefore, make no order as to costs. They must be costs in the cause.

I wish it to be distinctly understood that I am most averse to any action set down in this Court being sent to be tried before a Judge and jury without its being clearly settled what it is that is to be tried by the jury.

Solicitor for Plaintiff: *H. H. Wells.*
Solicitors for Defendants: *Baylis, Baylis, & Pearce.*

(1) *Ante*, p. 235.

V.-C. B.

1877

March 8.

In re WESTBOURNE GROVE DRAPERY COMPANY.

Company—Winding-up—Lease—Claim of Mortgagee of Lessor in respect of Future Breaches—Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—"*Debts and Liabilities provable.*"

The enactment of sect. 10 of the *Judicature Act*, 1875, which provides that in the winding-up of companies the same rules shall prevail and be observed as to debts and liabilities provable as may be in force for the time being under the law of bankruptcy, does not comprise, amongst such liabilities, the obligations of a company in liquidation under covenants in a lease to pay rent and not to assign without consent, no breach having taken place.

A mortgagee in possession of a lessor to a company, now in liquidation, claimed to have impounded out of the assets a sum equal to the aggregate future rent, or such other sum as might be sufficient to provide for the liabilities of the company under the lease; or, if such sum could not be raised, to be admitted to prove for the amount:—

Held, that there was no privity of contract between the applicant and the company; and that until breach he could not have assets impounded or be admitted to prove; and claim dismissed.

Statement.

ADJOURNED SUMMONS.

The leases of three houses, numbered 63, 65, and 67, *Bishop's Road, Paddington*, became vested for the residue of terms, in the first two houses of 96¼ years from Michaelmas, 1845, and in the last house of twenty-one years from Lady Day, 1867, in *Robert Scarrit Young Lawton* and *George Head*.

By three underleases, dated the 5th of July, 1873, the three houses were demised by *Lawton* and *Head*, the two former for terms of forty years from Midsummer, 1873, at rents of £350 and £400 respectively, and the latter for a term of 14¾ years from the same date, at a rent of £450, to *Robert Milner*.

By three indentures, dated the 2nd of July, 1874, the last-mentioned underleases were assigned by *Milner* to the *Westbourne Grove Drapery and Furnishing Company, Limited*.

By an indenture dated the 18th of September, 1874, the same three houses were demised by *Lawton* and *Head*, for the residues of the terms less one day, to *Helen Smith*, widow, *Robert King*, and *George Cutt*, subject to the underleases to *Milner*, by way of mortgage, to secure £7000 and interest.

By an indenture dated the 21st of December, 1875, which recited the mortgage of September, 1874, the same three houses were demised by *Lawton* and *Head* for the residues of the terms except the last day, subject to the mortgage of September, 1874, and subject to the underleases to *Milner*, to *Henry Mann*, by way of further charge, to secure the performance of an agreement by *Mann* to take up certain acceptances of the mortgagors.

On the 4th of November, 1876, the voluntary liquidation of the company, which had been commenced by resolutions passed on the 13th of October, 1876, was ordered to be continued under supervision.

On the 20th of December, *Mann*, the second mortgagee, took out a summons that the liquidators might be ordered, out of the assets of the company, to pay into Court "the sum of £32,737 10*s*., or such other sum as may be sufficient to provide for the liabilities of the company under the leases of the premises occupied by it; and, if necessary, that the liquidators may be ordered to call up the uncalled capital of the company, and pay the same into Court, or that, if such sum of £32,737 10*s*. cannot be raised, the proof of Mr. *Mann* may be admitted against the estate of the company to the amount of £32,737 10*s*., or for such other sum as the Court may think fit, after deducting the value of any security held by the said *H. Mann* on the property of the above-named company."

By an affidavit in support, filed on the 3rd of November, 1876, *Mann* stated that there was due to him under his mortgage about £4242; that he had, with the concurrence of the first mortgagee, entered into the receipt of the rents of the premises, and that the company had paid him the quarter's rent of £300 up to the 24th of June, 1876.

He further said that, from the 29th of September, 1876, to the expiration of the leases of 63 and 65, *Bishop's Road*, there remained a term of 36¾ years unexpired, which, at £750 per annum, gave a sum of £27,562 10*s*.; and from the 29th of September, 1876, to the expiration of the underlease of 67, *Bishop's Road*, there remained a term of 11½ years unexpired, which at £450 per annum, gave a sum of £5175; and that he was informed and believed that the premises could not be let at a rent at all equal to those which the company were at present paying.

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Argument.

It was admitted that the rent due at Christmas last had been paid, and that there had been in fact no breach.

Hilbery, for the summons:—

If the company continue to hold the leases, they will be liable to pay the rents to the end of the terms; if they should assign without consent of the lessor, they will be liable for the breach of covenant: *Varley* v. *Coppard* (1); and if they should assign with consent, or without being entered upon, for less rents than £1200 a year, we, who took the security of £1200 a year for our debt, shall be entitled to prove for the difference to the end of the several terms.

By the 10th section of the *Judicature Act*, 1875, the same rules "as to debts and liabilities provable" as are in force in bankruptcy are made applicable to the winding-up of companies; that is to say, there is imported into the *Companies Acts*, 1862 and 1867, the 31st section of the *Bankruptcy Act*, 1869, under which liabilities are provable as debts. Hence the liabilities of this company under its leases are provable as debts in this liquidation.

A lease is in the nature of a continuing contract. Under sect. 23 of the *Bankruptcy Act*, 1869, the liquidator may disclaim. Until he does so the contract is not determined, and the liability for rent remains. If he disclaims, the effect of the Act of 1869 is "to free the bankrupt from liability in respect of future breaches of contract, and to give the persons whose contracts were broken or put in jeopardy by reason of the bankruptcy a right to prove against the bankrupt's estate, instead of the personal liability of the bankrupt;" *per James*, L.J., in *In re Sneezum* (2). The measure of damages for such a breach is such a sum as will, as far as money can, put the Plaintiff (in this case the mortgagee of the lessor) in the same position as if he had still the liability of the Defendant (here the lessee) to rely upon, instead of an inferior liability: *Williams* v. *Earle* (3). Here it is shewn that the premises will not let to any one else at the same rent. Hence we are entitled to prove for the whole rent; or if the premises be let at a less rent, at least for the difference.

(1) Law Rep. 7 C. P. 505. (2) 3 Ch. D. 463, 472.
(3) Law Rep. 3 Q. B. 739.

The Chief Clerk refused to make an order on this summons on the ground that hitherto there has been no breach—that we have not yet been damaged; but under the rules which are in force under the law of bankruptcy, we are at liberty to prove for liabilities that may ripen into debts; and to have assets impounded to meet those liabilities: *Ex parte Marshall* (1); *Ex parte Dobson* (2); *Ex parte Rippon* (3).

Before the Judicature Acts, there was, under the Companies Acts, some conflict of authority with regard to a claim in respect of future rent. In *In re Haytor Granite Company* (4) such a claim was held admissible; but whether such a claim, where entered, will carry a right to have dividends impounded, seems doubtful: *In re Telegraph Construction Company* (5). All this uncertainty is now removed by the provision which imports the rules of bankruptcy law into the Winding-up Acts.

Kay, Q.C., and *Whitehorne*, for the company:—

Under the 158th section of the *Companies Act*, 1862, a claim for future rent may be admitted; but the Court will not order a sum to be impounded: *Horsey's Claim* (6). The case of *In re Telegraph Construction Company* arose under sects. 13 and 14 of the Act of 1867, in a case of reduction of capital.

Under the *Bankruptcy Act*, 1869, ss. 23, 24, all the bankrupt can prove for is the damage occasioned by the disclaimer of the trustee.

The answer to the application is that these provisions about the disclaimer of the trustee do not enter into the Winding-up Acts at all; they are not included within sect. 10 of the *Judicature Act*, 1875, which relates only to rules "as to debts and liabilities provable."

It is true that the rents have been received by the applicant, with the permission of the first mortgagee; but that does not make him our landlord; he is only our landlord's agent.

The claim is of the most portentous kind; it is to have the whole possible rent of three long leases raised out of the assets

(1) 1 Mont. & A. 118, 145.
(2) Ibid. 666, 672.
(3) Law Rep. 4 Ch. 639.
(4) Law Rep. 1 Ch. 77.
(5) Ibid. 10 Eq. 384.
(6) Ibid. 5 Eq. 561.

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and impounded. Such a claim cannot be according to law; it is not the law in administration of assets: *King* v. *Malcott* (1); nor under the Companies Acts: *Horsey's Claim* (2). In *In re Gartness Iron Company* (3) a claim was allowed—not a proof. In *In re Haytor Granite Company* (4) the company was the original lessee; but nothing was ordered to be impounded.

Argument.

No case has been or can be cited where a trustee in bankruptcy has been ordered to impound assets to cover contingent liabilities under a lease.

Hilbery, in reply:—

"Liability" as defined by sect. 31 of the *Bankruptcy Act*, 1869, is of the widest possible signification, and is ample to cover this risk.

It may be that it was for the purpose of avoiding this liability that the company went into voluntary liquidation.

Judgment.

BACON, V.C.:—

I do not think the applicant entitled upon any ground.

He is the mortgagee of certain persons, who, sometime in the year 1873, made three leases, reserving certain rents, to a Mr. *Milner*.

Mr. *Milner* assigns to the company. While the company retain the interest which Mr. *Milner* conferred upon them by that assignment, they are bound by all the stipulations contained in their contract with him. There is no privity between the applicant and the company. It has been argued as if a debt had been contracted; but there has been no debt contracted. Hitherto, the covenants of the lease have been all duly performed; the rent has been duly paid, and how am I to assume that it will not be duly paid in future? Because some valuer comes forward, and says, if the houses had now to be let they would not let at so high a rent, the liquidator is asked to pay into Court all the rent which would accrue due, if the leases went on to their natural termination. There is no ground whatever on which I can do that. There is no instance in which the Court has ever done it. The

(1) 9 Hare, 692.
(2) Law Rep. 5 Eq. 561.
(3) Law Rep. 10 Eq. 412.
(4) Ibid. 1 Ch. 77.

cases in which the Court has impounded a sum of money to answer future liability, are where there has been a breach of contract, and where there is a plain right to have something.

The cases in bankruptcy which have been referred to, where moneys have been impounded, are cases in which the Court was satisfied there was a debt of some sort or other, which was claimed. Whether the amount which was claimed was the right amount or not, could not then be ascertained, and in order to do justice to everybody, a sum was ordered to be paid into Court to answer the liability when it should ripen into a debt.

In re Sneezum (1), which has been referred to, and so much relied upon, was a case where the contract had been broken. There is no breach of contract here. The proof which was allowed in that case was not in respect of any future liability. The trustees in bankruptcy in that case carried on what they thought was a very beneficial contract, and, as long as they thought it was beneficial to them, they carried it on; and then they stopped. Then the persons with whom the contract was made came under the very terms of the statute, and had a right to prove for the damage they had sustained by that breach of contract. There is no breach of contract here. There is nothing to prevent the company assigning this lease to-morrow, except that clause which covenants that they are not to assign, and if they assign, there is an end to all their liability.

I cannot conceive any ground on which the claim can be sustained. The reference to the practice in bankruptcy is neither conclusive nor perfect. The general terms of the *Judicature Act* (Act of 1875, s. 10), that debts and liabilities which may be proved in bankruptcy may also be proved under the Winding-up Acts, have not the operation contended for. The statute seems to make no such provision as the *Bankruptcy Act* makes in favour of trustees and creditors in bankruptcy, who, when there is any onerous obligation entered into by the bankrupt, may get rid of it Whenever they think fit they may disclaim. They may be called upon by the persons who are interested to disclaim or not, and if they fail to disclaim within the prescribed period, then the liability falls upon the estate, and not upon them personally.

(1) 3 Ch. D. 463.

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In my opinion, there is no ground whatever in this case for the claim; the contract has not been broken, nor can I assume that any liability exists, for it is not certain that the premises will not re-let for the full amount of the rent which is reserved. But, in the meantime, I am asked to intercept—to frustrate in fact—the operation of the winding-up, because the applicant thinks he should like to have a sum of money taken out of these assets equal to all the rent which would be coming due under these leases.

I think, upon the whole, that on no ground can the application be entertained.

The summons must be dismissed with costs.

Solicitors: *F. W. & H. Hilbery; Lewis, Munns, & Longden.*

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Dec. 16.

[1875 B. 93a.]

Bankers—Depositors—Death of Partner—New Partner—Proof against—Liability of Deceased Partner's Estate—Fresh Receipt Notes—Novation.

Prior to April, 1872, a firm of bankers, consisting of two partners, *A.* and *B.*, received money on deposit at interest, for which they gave deposit notes in the usual form to the depositors, who, when the amount on deposit was increased or diminished, gave up their old notes and received fresh ones for the new amount. In April, 1872, *X.* and *Y.* were admitted into the partnership, and notice of the change in the firm was given to the depositors. A fortnight afterwards *A.* died, and the business was carried on under the same firm by *B.*, *X.*, and *Y.* In 1874 *B.* died, and the business was carried on by *X.* and *Y.*, still under the same firm, until 1875, when the bank stopped payment, and went into liquidation.

The depositors all knew of *A.*'s death, and none of them made any claim against his estate. Some of them had not altered the amount of their deposit, but retained the notes they had received in his lifetime. They had, however, received interest from *X.* and *Y.* Others had increased and others had diminished the amount of their deposit after *A.*'s death, receiving in each case fresh deposit notes; and they had all proved in the bankruptcy of *X.* and *Y.* for the amount due on their notes as money "advanced and lent" to the bankrupts:—

Held, that in each case there had been a complete novation, and that none of the depositors were entitled to prove against the estate of *A.*

Statement.

CLAIMS in an administration action by *Amiel*, *Priest*, and *Stoney*.

Prior to the 16th of April, 1872, *John Holmes*, the testator in the cause, and one *George Exley*, carried on in partnership at *Leeds* the business of bankers, under the firm of *John Holmes & Co.*, and by the name of the *Leeds Mercantile Bank*.

On the 16th of April, two new partners, *Woodhead* and *Joseph Holmes*, were admitted into the firm. Notice of the admission of the new partners as members of the firm was given by circular to all the customers of the bank, including the present claimants, and the business was carried on by the old and new partners together.

On the 29th of April, 1872, the testator died; his death was advertised in the newspapers, and the usual statutory advertisements for creditors on his estate were issued; and it appeared that although the present claimants did not see these advertise-

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ments, they in fact knew of his death, and made no claims against his estate until those hereinafter mentioned.

After the testator's death the business was carried on under the same firm by *Exley*, *Woodhead*, and *Joseph Holmes*, till the 23rd of May, 1874, when *Exley* also died, and from that time the business was carried on by *Woodhead* and *Joseph Holmes*, still under the firm of *John Holmes & Co.*, down to December, 1875, when the firm stopped payment and went into liquidation.

The bank, which was chiefly a deposit bank, was in the habit of receiving moneys from customers on deposit, and paying interest for the same. Whenever a customer paid in money to a deposit account the bank gave him a receipt or deposit note in the following form:—

"Received from . . . the sum of . . . sterling to the credit of . . . deposit account with the *Leeds Mercantile Bank*, subject to . . . notice of withdrawal.

"*John Holmes & Co.*

"This deposit receipt to be given up on withdrawal of the whole or any part of the deposit."

When a depositor drew out of the bank any portion of his deposit, or paid in any further sum to his deposit account, he always gave up his old deposit note, and received a fresh note precisely in the same form for the amount then standing to his credit, and these notes were, both before and after the death of the testator and down to the stoppage of the bank, signed "*John Holmes & Co.*" Moreover, whenever any interest on a deposit note was credited to a depositor and not drawn out, a fresh deposit note was given to him in lieu of the old one, and the old one was cancelled.

All the holders of deposit receipts, including the present claimants, proved in the bankruptcy against *Woodhead* and *Joseph Holmes* for the amount of the principal moneys and interest due on their deposit notes; and they each supported his claim by an affidavit that *Woodhead* and *Joseph Holmes* were justly and truly indebted to them in the sum specified "for money lent and advanced by me to the said debtors," for which sum they had not "had or received any satisfaction or security except the following

deposit receipt." They then each scheduled a deposit note signed "*John Holmes & Co.*," that in *Priest's* case being dated the 1st of July, 1875, that in *Stoney's* case, the 13th of November, 1873, and those in *Amiel's* case, May and October, 1866, and July, 1870.

And they all, on the 25th of May, 1876, received a dividend of 2*s.* 6*d.* in the pound upon the amount of their proofs; but the claimants now deposed that at the time they made their affidavits in proof of their claims against the estates of *Woodhead* and *Joseph Holmes*, they did not intend to do, nor did they understand that they were doing, anything which could be construed into an election by them of a remedy against the estates of the bankrupts in lieu of their claims against the testator.

The present action having been brought in December, 1875, by the executors of *John Holmes*' will against the persons beneficially interested thereunder, for the administration of his real and personal estate, the usual advertisements were issued for creditors of the estate. In reply to these advertisements, the persons who held deposit notes of the bank at the time of the testator's death sent in claims against his estate for the amounts remaining due to them upon their deposit notes. Upon the claims so sent in, three classes of questions arose and were submitted to the Court upon a representative case selected from each class of claimants.

The first case was that of Miss *Amiel*, who had not altered the amount of her deposit. She was the holder of three deposit notes given to her upon deposits made in 1866 and 1870, during the lifetime of the testator and before *Woodhead* and *Joseph Holmes* became partners, and she had neither increased nor diminished the amount of her deposits, but had regularly received interest upon them from the old and new partners down to the stoppage of the bank.

The second case was that of Mr. *Priest*, who had increased the amount of his deposit. He had made a deposit of £186, and received a note for that amount in January, 1872, during the lifetime of the testator, and when he and *Exley* were the only members of the firm, and after the testator's death he from time to time deposited additional moneys, continuing to do so after *Woodhead* and *Joseph Holmes* had become the only members, and on each occasion he received a fresh deposit note for the aggregate

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amount of his deposit. The deposit note he held at the time the firm stopped payment was for £254, and he claimed the £186 due at the testator's death.

The third case was that of Mr. *Stoney*, who had diminished the amount of his deposit. He was at the time of the testator's death the holder of a deposit note for £720, given when the testator and *Holmes* were the only partners. In August, 1872, when *Exley*, *Woodhead*, and *Joseph Holmes* were the partners, he withdrew £100 and received a fresh note for £620, and he withdrew a further £100 in the following November, receiving from the same three partners a note for £520. He also received interest until the stoppage of the firm.

It did not appear that any deposit receipts were given between the admission of *Woodhead* and *Joseph Holmes* and the death of the testator.

Argument.

Robinson, Q.C., and *Northmore Lawrence*, for the claimants in each case:—

None of the claimants, in proving against the estate of the bankrupts, had any intention of accepting a remedy against that estate in lieu of the liability of the estate of the testator, nor did their so proving have the effect of releasing his estate: *Winter* v. *Innes* (1); *Sleech's Case* (2); *Kellock's Case* (3); *Ex parte Cama* (4); *Bedford* v. *Deakin* (5). If not, there is, as regards Miss *Amiel's* case, nothing but her leaving her money in the bank and continuing to receive interest from the new firm upon what she lent to the old firm, and, as regards *Stoney's* and *Priest's* cases, the additional fact that they took new deposit notes upon altering the amount of their deposits.

This receipt of interest, however, did not deprive Miss *Amiel* of her right against the estate of the testator. In *Daniel* v. *Cross* (6), where the new partners re-issued the notes of the former partnership, the assets of the deceased partner were held not to be discharged by the receipt of interest from the surviving and new partners, and this is a distinct authority on that point in

(1) 4 My. & Cr. 101, 108, 109.
(2) 1 Mer. 539, 568.
(3) Law Rep. 3 Ch. 769.
(4) Law Rep. 9 Ch. 686.
(5) 2 B. & A. 210.
(6) 3 Ves. 277.

favour of the claimant in *Amiel's* case. Again, the leaving of money by a creditor of a bank in the hands of the surviving partners does not constitute a new contract, or operate as a relinquishment of the old security: *Sleech's Case* (1).

Nor, as regards the other two cases, is the taking a new security enough, without agreement express or implied, to discharge the old firm: *Harris* v. *Farwell* (2); *Lindley* on Partnership (3); *Swire* v. *Redman* (4). These deposit notes are not, however, "securities." In *Hopkins* v. *Abbott* (5) their nature was considered, and it was held that they are not securities for money, but simply acknowledgments of indebtedness. The acceptance of a fresh deposit note could not, therefore, operate as a change of security. The question, however, is one of intention to release: *Lindley* on Partnership (6); and the evidence entirely negatives any such intention; while there has been no such laches on the part of any of the claimants as to deprive them of their rights: *Winter* v. *Innes* (7).

W. Pearson, Q.C., and *Freeling*, for the Defendants, the persons beneficially interested in the estate of the testator *John Holmes*:—

In all three cases there has been a complete novation, and a substitution of new debtors in the place of the old. Secondly, there has been such laches on the part of all the claimants as to disentitle them to relief in equity. The claims are mere equitable claims, and the debts in respect of which they are made were never the debts of *Woodhead* and *Joseph Holmes* at all. It is not a question of intention, but of the construction which the law will put upon the acts of the parties, and it is simply whether *B.* is substituted as the debtor in respect of a debt incurred by *A.*: *Hart* v. *Alexander* (8); *Lindley* on Partnership (9). *Swire* v. *Redman* has no bearing upon the question, and *Hopkins* v. *Abbott* is inapplicable, while all the other cases cited on behalf of the claimants are cases in which surviving joint debtors were held liable, and there was no question of the introduction of a new partner. That

(1) 1 Mer. 539, 568.
(2) 15 Beav. 31.
(3) 3rd Ed. p. 462.
(4) 1 Q. B. D. 536.
(5) Law Rep. 19 Eq. 222.
(6) 3rd Ed. p. 459.
(7) 4 My. & Cr. 101.
(8) 2 M. & W. 484; S. C. 7 Car. & P. 746.
(9) 3rd Ed. p. 597.

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is the fallacy on which the argument for the claimant has proceeded. Neither *Woodhead* nor *Joseph Holmes* were partners when these liabilities were incurred, and the distinction is plain between the case of a creditor continuing to deal with a person who is a surviving joint debtor, and that of a creditor dealing with a stranger who was never a joint debtor at all. In the former there is not, and in the latter there is novation, and the acceptance of a new debtor in substitution for the old: *In re National Provincial Society* (1); *In re International Life Assurance Society* (2); *In re Times Life Assurance Society* (3); *In re Anchor Assurance Society* (4); *In re Medical, &c., Assurance Society* (5). These are cases of insurance companies, but the principles involved are precisely the same, and they are further illustrated by the cases of *Evans* v. *Drummond* (6), *Reed* v. *White* (7), and *Thompson* v. *Percival* (8).

The doctrine of novation is, in fact, drawn from the Civil Law, and both before and after *Justinian* the Romans were familiar with the principle that if a creditor stipulates with a stranger for the payment of his debt, that is novation; but without the introduction of the stranger there must be a new term or a new condition of the contract in order to create novation: *Gaius*, Commentaries (Book III. ss. 176, 177); *Justinian's* Inst. Book III. tit. 30, pl. 3, 4, 5; and *Pothier's* Pandects, Book XLVI. Moreover, although all these debts were the debts of the testator and *Exley*, all the claimants have proved in the bankruptcy against *Woodhead* and *Joseph Holmes* as upon legal debts contracted by them, and none of those debts, if founded on contracts entered into by the testator and *Exley*, could have been admitted to proof as debts legally due from *Woodhead* and *Joseph Holmes* unless the estates of the original debtors had been discharged. This alone is fatal to these claims: *Forth* v. *Stanton* (9); *Cuxon* v. *Chadley* (10); *Wharton* v. *Walker* (11); *Addison* on Contracts (12). These claimants

(1) Law Rep. 9 Eq. 306.
(2) Ibid. 316.
(3) Ibid. 5 Ch. 381.
(4) Ibid. 632.
(5) Ibid. 6 Ch. 362.
(6) 4 Esp. 89.
(7) 5 Esp. 122.
(8) 5 B. & Ad. 925.
(9) 1 Wms. Saund. 209 a, 211.
(10) 3 B. & C. 591, 595.
(11) 4 B. & C. 163.
(12) 7th Ed. p. 272 *et seq.*

had all notice of the death of the testator, and the change in the firm.

They were then proceeding to argue the question of laches when they were stopped by the Court.

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Dickinson, Q.C., and *Romer*, for the Plaintiffs, the trustees of the will of the testator.

Argument.

Robinson, in reply:—

The proof against the estates of *Woodhead* and *Joseph Holmes* was not enough to deprive the claimants of the rights which they had against the estate of the testator. The effect of the notices given when the new partners were taken, and of the subsequent dealings of the depositors with the new firm, was to substitute the liability of all the four members of the new firm for the liability of the two members of the old firm. There can be no novation without an intention to novate on the part of the creditor: *Pothier's* Pandects (1); and the case is on all fours with *Harris* v. *Farwell* (2) and *Hart* v. *Alexander* (3).

HALL, V.C.:—

Judgment.

As regards the second and third of these claims, being the cases in which new deposit notes were given, I think the contention is established that the new partners only were liable. It has been argued that the giving up of the old notes and the receiving the new ones was a matter of form only; and that the original liability was intended to and did continue notwithstanding. But the circular stated that the new partners would carry on the business in the old name, and the new notes were given after such new partners had become the sole surviving members of the firm. And accordingly the undertaking of the liabilities of the old firm by the new members of the firm supplied a good consideration for giving up the claim upon the old partners. That being so, it is quite impossible to hold that in these cases the old liability continued; a new liability was substituted for the original liability.

(1) Book xlvi. sect. 20.
(2) 15 Beav. 31.
(3) 2 M. & W. 484; S. C. 7 Car. & P. 746.

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The case of Miss *Amiel* is somewhat different from the other two cases. After the death of *John Holmes* she continued to receive interest from *Exley* (the survivor of the two partners originally liable) and the two new partners, and after *Exley's* death from the two new partners alone; that is, from two persons not originally liable to her. The new partners being treated, and treating themselves as liable to satisfy these claims, they cannot, I think, be considered as paying interest on behalf of the representatives of *John Holmes*, the deceased partner, but must be taken to have paid it entirely on their own account. Moreover, the proof in the bankruptcy was in all three cases solely against the estates of *Woodhead* and *Joseph Holmes*, and was not, as in *Harris* v. *Farwell* (1), "for money had and received to and for the use of" the creditors, but was for "money lent and advanced" to the bankrupts. This is, in my opinion, quite sufficient to shew, without any renewal of the deposit notes, that there was an acceptance of the liability of the bankrupts, and a release of the former members of the firm. This distinguishes the case from *Harris* v. *Farwell*, and I must hold that Miss *Amiel*, by her receipt of interest and her mode of proof against the bankrupt's estate, has accepted them as her debtors in lieu of the testator, and consequently that her claims, as well as the two others, must be disallowed; I make no order as to costs.

Solicitors: *Linklater & Co.; Torr & Co.; Speechley & Co.*

(1) 15 Beav. 31.

ROWE *v.* GRAY.

V.-C. H.

[1876 R. 47.]

1876

Dec. 20.

Partition Action—Right to Sale instead of Partition—Infant Defendant—Partition Act, 1868 (31 & 32 *Vict. c.* 40), *s.* 4.

Under the 4th section of the *Partition Act* of 1868, it is the right of a Plaintiff entitled to a moiety of the property to have a sale instead of a partition, notwithstanding the opposition or disability of a Defendant who is entitled to the other moiety, unless such Defendant shews "good reason to the contrary."

Upon the request of a Plaintiff so entitled, the Court decreed a sale instead of a partition of ten leasehold houses held under one lease, although it was objected on behalf of an infant Defendant entitled to the other moiety that his income would be thereby materially diminished.

Statement.

THIS was a partition action, in which the property consisted of ten leasehold houses in *Ashmole Place*, *Kennington*, held under one lease. These houses were bequeathed by the will of *Elizabeth Holmes* (who died in 1862) to the Plaintiff, *Mary Martha Rowe*, and the Defendant, *J. S. G. Gray*, for their own sole use and benefit absolutely, with power to the executor of the testatrix to apply so much of the rents and proceeds as might be requisite for the proper maintenance, education, and advancement in life of the Plaintiff and the Defendant *Gray*, until they should respectively attain the age of twenty-one years, and in the meantime to invest the surplus rents and proceeds for their mutual benefit and advantage, and in case one of them should die before attaining the age of twenty-one years, then the survivor of them was to take the share of her or him so dying, as the case might be. The Plaintiff attained twenty-one in June, 1875, and married shortly afterwards, and was, under her marriage settlement, entitled to her share in the property of the testatrix, to her separate use. The Defendant *Gray* was still an infant. The Plaintiff, being entitled to a moiety of the property, desired a sale, and produced the evidence of a surveyor that the ten houses were of various values, there being in his opinion a difference of £80 between the value of the most and least valuable of them, and that scarcely any two of them were of the same value, the rents varying from 6*s.* to 10*s.* per

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week, that the property required personal superintendence, and that all the ten houses were held under one lease.

A sale was objected to on behalf of the infant Defendant, upon the ground that the rents and profits of the houses yielded a much larger income than would the interest upon the moneys realized by the sale thereof if invested under the direction of the Court, and that a partition would accordingly be more for his benefit; and the evidence of a surveyor was produced to the effect that the income of the infant's share would probably be less by one-half if a sale were ordered, that the property was capable of being partitioned into two portions of five houses each of very nearly equal value, that the ground rent might be apportioned in equal moieties upon each portion, and that the person taking the first portion he named would only have to pay to the other the sum of £24 for equality of partition.

Argument.

E. Cutler (*Karslake*, Q.C., with him):—

Where a Plaintiff, who is entitled to one moiety of the property held in common, asks for a sale, it is, under sect. 4 of the *Partition Act* of 1868, imperative upon the Court to order a sale, unless the objecting parties will purchase, under sect. 5, the Plaintiff's share, or the Court sees good reason why a sale should not be ordered: *Pemberton* v. *Barnes* (1). But if the objecting party is under disability, and cannot give an undertaking to purchase, then, even under the 5th section, the Court will decree a sale: *Partition Act*, 1876 (39 & 40 Vict. c. 17), s. 6; *Drinkwater* v. *Ratcliffe* (2). There the party objecting was a married woman, here it is an infant. So, on the combined effect of the 4th and 5th sections, the Plaintiff is entitled to a sale. And there is no "good reason for the contrary," within the meaning of the 4th section, shewn on behalf of the Defendant, while, on the other hand, the fact that the houses are all held under one lease renders a partition very undesirable.

Dickinson, Q.C., and *Dundas Gardiner*, for the Defendant:—

We admit that it is the right of the owner of a moiety to have a sale unless there is good reason to the contrary; but here there

(1) Law Rep. 6 Ch. 685. (2) Law Rep. 20 Eq. 528, 532.

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is such reason. In *Pemberton* v. *Barnes* (1) the nature of the property, which consisted of a mansion-house and park of 300 acres, 3000 acres of land, and a manor extending over thirty miles, shewed that a sale would be more desirable than a partition; and in *Drinkwater* v. *Ratcliffe* (2) a farm-house and farm was divisible in thirty-sixth shares, so that it was, on the merits, the very case for a sale. Here, on the contrary, are ten leasehold houses which can readily be divided in moieties, and the evidence shews that a considerable loss of income is likely to be occasioned to the infant Defendant if the property is sold. It is not, therefore, for his benefit that a sale should take place, and we submit that we have shewn good reason to the contrary within the 4th section of the Act.

Sydney Peel, for the Defendant, the husband of the Plaintiff.

HALL, V.C.:— Judgment.

There must in this case be a decree for a sale. The 4th section of the *Partition Act* of 1868 gives to the owners of a moiety of the property a right to have a sale and distribution of the proceeds instead of a division of the property itself, unless the Court sees good reason to the contrary; and it has not been shewn to me that there is in this case good reason to the contrary. It appears that the property is held under one lease, and if sold would in all probability be offered in one lot. If a partition were directed instead of a sale, it is reasonably clear that it could not be effected without some payment being made for equality of partition; and where the money to make that payment is to come from in the case of an infant, I do not know, nor do I see why the Plaintiff should be required to find such money. The case, then, is one to which the 4th section of the Act of 1868 is applicable; and I may refer to the decision of Lord *Selborne*, when sitting for the Master of the Rolls, in *Wilkinson* v. *Joberns* (3), which was also a case under that section, in which the Plaintiffs, as owners of one moiety of an estate, desired, and the Defendant, as the owner of the other moiety, resisted a sale. There his Lordship said: "I think the Plaintiffs are entitled to what they

(1) Law Rep. 6 Ch. 685. (2) Law Rep. 20 Eq. 528.
(3) Law Rep. 16 Eq. 14, 15.

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ask. The Act of Parliament clearly throws the burden of proof upon the tenant in common who resists sale and claims partition, and the sole question is whether he has discharged himself of it by shewing special circumstances in the particular case which would make it wrong to direct the sale." Again, though *Drinkwater* v. *Ratcliffe* (1) was a case under the 3rd section of the Act, the Master of the Rolls observed upon the 4th, and in doing so says: "Then the 4th section provides that if the parties interested, to the extent of a moiety or upwards, request a sale, the Court shall sell, unless it sees good reason to the contrary—that is, irrespective of the nature of the property, irrespective of the number of persons, irrespective of absence or disability, irrespective of any special circumstances which make the Court think it beneficial. The parties interested to the extent of one moiety are entitled to a sale as of right, unless there is some good reason to the contrary shewn; they have not to shew any reason for the sale, but a reason to the contrary must be shewn." I cannot say that in this case good reason to the contrary has been shewn. Whether the infant will derive as much income from the proceeds of his share when invested as from the houses themselves, I do not know. It is doubtful, but I cannot allow myself to be influenced by that doubt, and I must accordingly give judgment for a sale.

Solicitors: *Kynaston & Gasquet; Nicol, Son, & Jones.*

(1) Law Rep. 20 Eq. 528, 530.

BOUCICAULT *v.* CHATTERTON.

C. A.
1876
V.-C. M.
Nov. 16.
C. A.
Dec. 13, 14.

[1876 B. 517.]

Dramatic Copyright—First Representation Abroad—3 & 4 Will. 4, c. 15—5 & 6 Vict. c. 45—7 Vict. c. 12, s. 19.

The author of a dramatic work which has been first represented in a foreign country is not entitled to any exclusive right of representation in this country, the representation of a dramatic work being a publication of it within the meaning of the statute 7 Vict. c. 12, s. 19.

Statement.

THIS was an action by Mr. *Dion Boucicault* against Mr. *Chatterton*, the lessee of *Drury Lane Theatre*, for an injunction to restrain the Defendant from representing, without the previous consent of the Plaintiff, a dramatic work called *The Shaughraun*, of which the Plaintiff was the author.

The Shaughraun was composed by the Plaintiff in 1874, and was first performed in November of that year at *New York*, the Plaintiff himself performing the principal part.

The drama was registered in *England* at *Stationers' Hall*, on the 29th of September, 1874, as a book under the *Copyright Act* (5 & 6 Vict. c. 45), but there having been an admitted inaccuracy in the form of registration, the piece was re-registered on the 4th of November, 1876, in the name of Mr. *Dion Boucicault*, as the proprietor of the copyright. The play was not printed.

In September, 1875, *The Shaughraun* was first played in *England* at *Drury Lane Theatre*, under a mutual arrangement as to profits between the Plaintiff and Defendant, and in the following December it was transferred to the *Adelphi Theatre*, where it was performed till the 22nd of January, 1876, the Defendant being at that time the lessee of both *Drury Lane* and the *Adelphi Theatres*. Mr. *Boucicault* subsequently returned to *America*, and wrote to the Defendant that he, the Plaintiff, had become a naturalized citizen of the *United States*. It did not, however, appear that the Plaintiff had done anything to give up his privileges as a British born subject.

In 1876 the Defendant proposed to reproduce *The Shaughraun*

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at the *Adelphi Theatre*, but the Plaintiff refused to allow it to be performed upon any terms until he should be able to come to *England* and play the part which he had previously performed.

The Defendant thereupon determined to proceed without the Plaintiff's consent, and advertised the performance for the 18th of November, 1876. The Plaintiff therefore commenced his action, and moved for an injunction. The motion was heard before Vice-Chancellor *Malins* on the 16th of November, 1876.

Argument.

Glasse, Q.C., and *Romer*, in support of the motion:—

In this case the Plaintiff's title to the copyright in the drama of *The Shaughraun* is admitted, and the question is whether he has lost the right to have his copyright protected. This depends upon the construction of the Copyright Acts. By 3 & 4 Will. 4, c. 15, s. 1, the author of any dramatic piece, composed and not printed or published by him or his assignee, has, as his own property, the sole liberty of representing or causing to be represented, in any part of the *United Kingdom* or the British dominions, such production as aforesaid, and shall be deemed and taken to be the proprietor thereof; and by the 2nd section a penalty is imposed for any person representing an author's work without his consent. By the Act 5 & 6 Vict. c. 45, s. 20, the term of copyright as provided thereby is applied to the liberty of representing dramatic pieces, "save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this Act, to the first publication of any book."

We claim the rights of an author under the Act of 3 & 4 Will. 4, c. 15, in *The Shaughraun*. This play has never been printed or published, though it has been acted, and therefore the Plaintiff is entitled to the copyright. In *Macklin* v. *Richardson* (1) an injunction was granted to restrain the publishing in a magazine a farce which had been acted but never printed or published, and the judgment contains this passage: "It has been argued to be a publication by being acted, and therefore the printing is no injury to the Plaintiff, but that is a mistake; for besides the advantage from the performance, the author has another means of profit from

(1) Amb. 694.

the printing and publishing, and there is as much reason that he should be protected in that right as any other author."

Higgins, Q.C., who appeared for the Defendant, said he rested his case upon the authority of *Boucicault* v. *Delafield* (1), in which a decision was given against Mr. *Boucicault* under the Act 7 Vict. c. 12, s. 19, in regard to another drama called *The Colleen Bawn*, which was first acted in *America*.

Glasse:—In that case the Court went upon the fact that one copy of the drama was printed, but there was no decision that the first representation of a play was a publication. The Act 7 Vict. c. 12, s. 19 (2), enacts that the author or composer of any dramatic piece which shall be first published out of Her Majesty's dominions shall not have any copyright therein or exclusive right to the public representation or performance thereof. This play has not been published abroad. Representation does not amount to publication. The view taken of *Boucicault* v. *Delafield* by *Copinger*, in his book on Copyright, agrees with this. He says (3), the 19th clause of the Act 7 Vict. c. 12, applies to British subjects first publishing in a foreign country, and for this he cites *Boucicault* v. *Delafield* and *Wood* v. *Boosey* (4).

The only right which an author has to a work not published is under the Act of 3 & 4 Will. 4, c. 15. The Act 5 & 6 Vict. c. 45, extends the copyright to representation. That Act made first representation equivalent to first publication for the purposes of that Act, and the 19th section of 7 Vict. c. 112, only restricts the right where there has been first publication abroad. That is a penal clause, and should be construed most favourably for the author, and the Court will give the strictest construction to the

(1) 1 H. & M. 597. 11 Jur. N.S. 282.

(2) 7 Vict. c. 12, s. 19: "It is enacted that neither the author of any book nor the author or composer of any dramatic piece or musical composition, nor the inventor, designer, or engraver of any print, nor the maker of any article of sculpture, or of such other work of art as aforesaid which shall after the passing of this Act be first published out of Her Majesty's dominions shall have any copyright therein respectively, or any exclusive right to the public representation or performance thereof, otherwise than such (if any) as he may become entitled to under this Act."

(3) Page 230.

(4) Law Rep. 2 Q. B. 340; Ibid. 3 Q. B. 223.

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words, and will not decide that publication means representation. Sect. 24 of 5 & 6 Vict. c. 45, expressly provides that non-registration under that Act shall not deprive an author of the rights given by the Act of Will. 4, and we come here under the Act of Will. 4. We do not claim under the Act of *Victoria*. The Defendant has admitted our right up to this time, and has applied for permission to act the play; he cannot now turn round and deny our right.

Higgins, Q.C., and *Terrell* (*Poulter* with them), for the Defendant, were not called upon.

Judgment, V.-C. M.

MALINS, V.C.:—

Mr. *Boucicault* is the acknowledged author of this dramatic work called *The Shaughraun*. It has already been so successful that I presume on that account Mr. *Chatterton* wishes to represent it again, for I find by correspondence between them that Mr. *Chatterton* asked Mr. *Boucicault's* permission to perform it. I am glad to find that, although no doubt Mr. *Chatterton's* advisers knew the state of the law at that time, Mr. *Chatterton*, greatly to his honour, did not desire to avail himself of the technical point of law, but wished to obtain the permission of Mr. *Boucicault*, and, I presume, to pay the usual fees for leave to produce the play; but Mr. *Boucicault*, having peculiar views upon the subject, refused to give his permission, and Mr. *Chatterton*, finding this, has taken the law into his own hands, and proposes to present the piece for representation in defiance of the remonstrances of Mr. *Boucicault*, his solicitor, and his brother, whom he has left in this country as his representative. I am now only to decide the point of law.

The right of a dramatic author to a piece is secured to him by the 3 & 4 Will. 4, c. 15, s. 1, the substance of which is stated in the marginal note: "The author of any dramatic piece shall have as his property the sole liberty of representing it, or causing it to be represented, at any place of dramatic entertainment." Therefore Mr. *Boucicault* has the same property in it, although it may not be published, which he would have in any dramatic piece which he had printed and published. The Act of 3 & 4 Will. 4 having given this copyright, and the copyright in books being

only for a certain period, it was only reasonable that the same limit should be given to dramatic authors. Therefore, the 5 & 6 Vict. c. 45, s. 20, prescribes that the first public representation shall be the date of publication, and, as if it were a book, the twenty-eight years is to commence from that period. Then comes the Act of Parliament which, I am sorry to say, is fatal to the author, according to the view I am bound to take of Mr. *Boucicault's* case. The 7 Vict. c. 12, is an Act to amend the law relating to international copyright; I need not refer to the general provisions of that Act, it is only necessary to refer to the 19th section. [His Lordship read sect. 19, and continued:—] Therefore, nothing can be more clear than that if the author of a dramatic piece first published that piece abroad, he by this section is absolutely deprived of any exclusive property in it in this country.

Then comes the question, what is publishing a work abroad? If that had not been the subject of judicial decision, I should have considered it open to very great doubt as to what really does amount to publication. No one would have the slightest doubt that if it has been printed and published abroad this section deprives the author of any right in this country; but the question I have before me now is with regard to a dramatic piece which has not been printed and published, but only acted. Ought that to be considered publication? That question originally did admit of considerable doubt. For myself, I should certainly have thought that when a man is the author of a dramatic piece, which he does not print and publish, and which he does not intend to print and publish, but which, as far as he can, he intends to retain as his own property during the period for which the law secures it to him, and only allows it to be acted by his permission, then publicly representing the piece would be publication, and I think I should have come to that conclusion; but it is unnecessary for me to go further into the question, because the principal points in the case arose in a suit in which Mr. *Boucicault* was Plaintiff, and which came on before Vice-Chancellor *Wood* in 1863, with regard to another dramatic piece better known than even this piece is, and which was called *The Colleen Bawn*. Mr. *Boucicault* filed a bill against Mr. *Delafield*, the proprietor of a theatre in the provinces, to restrain his performing *The Colleen Bawn*. It turned out that *The*

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Colleen Bawn, like the present piece, had been performed in *New York*. Then came the question as to publishing it abroad. If he had published it abroad, it was clearly admitted he would have no exclusive right. Now what had he done? He had not published it in the sense that he had printed and published it, but he had publicly performed it. Vice-Chancellor *Wood* decided that the public performance in *New York* was a publication, and that, having published it in that way, he was, under the 19th section of the 7 Vict. c. 12, absolutely deprived of the exclusive right in this country. Mr. *Glasse* contended that the Vice-Chancellor proceeded under this section on the ground of printing; but it is perfectly clear to my mind, on considering the whole case, that the Vice-Chancellor, never having referred to the printing, but to the representation, did decide it on the ground that the public acting of it in *New York* was a publication which deprived the author (Mr. *Boucicault*) of exclusive right in this country. I think that is clearly shewn by the concluding remarks of the judgment. After referring to the 19th section, the Vice-Chancellor says (1): "If Mr. *Boucicault* had first represented his piece in this country he would have been entitled to the copyright given by the earlier statutes. So, also, if he had given his first representation in any country with which a convention had been made under the *International Copyright Act*, he would have been entitled under that Act to all the same privileges. But in no case is a person to enjoy any rights conferred by the old Acts concurrently with those created by the *International Copyright Act*. This is the effect of the 19th section. . . . The plain purpose of the statute is to secure for this country the benefit of the first publication of new works, and certain conditions are made without which works first published abroad are not to be entitled to copyright. These conditions have not been complied with. The Plaintiff, therefore, fails in his demand, and the bill must be dismissed." Plainly, therefore, shewing that if Mr. *Boucicault* had first represented the play in *England* he would have been entitled to the copyright, but, as he published it in *America* by acting it there, Vice-Chancellor *Wood* dismissed the bill. That decision is binding on me. It is a decision from which I do not dissent; on

(1) 1 H. & M. 602.

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the contrary, I agree with it. It is a decision that works considerable hardship, but my duty is clear, that is to say, I am bound by authority to hold that the acting this play in *New York* was a publication within the meaning of 7 Vict. c. 12, s. 19. By that publication Mr. *Boucicault* has lost his exclusive right of performance, and I must therefore refuse the motion.

As to the costs of the motion, considering that the case of *Boucicault* v. *Delafield* (1) has been before the profession for the last thirteen years, and that this point in dramatic law was perfectly well known to Mr. *Boucicault*, having been decided in his own case under precisely similar circumstances to those in the case at present under decision, and considering also that Mr. *Boucicault* could have treated with Mr. *Chatterton* for the production of the play in this country, and could have made terms with him, I feel myself bound to refuse the motion with costs.

C. A.

The Plaintiff appealed against this decision. The appeal was heard on the 13th and 14th of December.

Argument.

Glasse, Q.C., and *Romer*, for the Plaintiff:—

The nature of rights of this kind is shewn by *Jefferys* v. *Boosey* (2). They depend entirely on statute law. The right of the author of a play to its exclusive representation depends upon 3 & 4 Will. 4, c. 15. This right as regards unprinted plays was preserved by 5 & 6 Vict. c. 45, s. 24, which leaves them on the same footing as before. It cannot have been intended to take away by the statute 7 Vict. c. 12, a right thus carefully guarded by 5 & 6 Vict. c. 45; and we say that this statute only takes away the right as to plays published abroad by printing. *Boucicault* v. *Delafield* is against us, but that case is to be considered as also under appeal. The decision was not appealed from because the parties became bankrupt. We contend that representing a play is not a publication within the meaning of the Acts: *Macklin* v. *Richardson* (3); *D'Almaine* v. *Boosey* (4); *Coleman* v. *Wathen* (5).

(1) 1 H. & M. 597.
(2) 4 H. L. C. 815.
(3) Amb. 694.
(4) 1 Y. & C. Ex. 298.
(5) 5 T. R. 245.

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Argument.

Higgins, Q.C., and *Terrell* (*Poulter* with them), for the Defendant:—

The question is, first, would the Plaintiff have had a right under 3 & 4 Will. 4, c. 15, if the statute 7 Vict. c. 12, were out of the way? and, secondly, if he would, does the latter statute take that right away? There is not a single case under the Copyright Acts which defines "publication" for the present purpose. *Macklin* v. *Richardson* (1) and *D'Almaine* v. *Boosey* (2) were before the Act 3 & 4 Will. 4, c. 15, and do not bear upon the case, for until that Act there was no such thing as an exclusive right of acting a play. The word "publication" is often used in the widest sense in the Acts relating to this subject. Where precision is required the word for particular purposes is defined, in other cases it must be understood in its natural sense with regard to the subject-matter. Thus, as regards a work of sculpture it cannot mean publication by printing. According to the contention of the Plaintiffs a subject of a country without any convention as to copyright would be better off than a subject of a country which has entered into one, for the latter can only get the benefit of the Act 7 Vict. c. 12, by complying with certain formalities. Then if we turn to 15 & 16 Vict. c. 12, sects. 4 and 5 shew that the Legislature considered a play first acted abroad as excluded from all capacity of being privileged here: *Jefferys* v. *Boosey* (3).

[They were then stopped by the Court.]

Glasse, in reply, referred to *Lee* v. *Simpson* (4).

Judgment, C. A. James, L.J.

JAMES, L.J. :—

Now that the matter has been fully argued out, I am of opinion that it is impossible for us to arrive at any other conclusion than that which was arrived at in *Boucicault* v. *Delafield* (5) by Vice-Chancellor *Wood*, and in the present case by Vice-Chancellor *Malins*, who not only considered himself bound by the decision of Vice-Chancellor *Wood*, but expressed his concurrence with it.

If sect. 19 of the statute 7 Vict. c. 12, were taken by itself, I think that no one could have any doubt whatever about its effect.

(1) Amb. 694.
(2) 1 Y. & C. Ex. 298.
(3) 4 H. L. C. 815, 852.
(4) 3 C. B. 871.
(5) 1 H. & M. 597.

It enacts that "neither the author of any book, nor the author or composer of any dramatic piece or musical composition, nor the inventor, designer, or engraver of any print, nor the maker of any article of sculpture, or of such other work of art as aforesaid, which shall, after the passing of this Act, be first published out of Her Majesty's dominions, shall have any copyright therein respectively, or any exclusive right to the public representation or performance thereof, otherwise than such (if any) as he may become entitled to under this Act." Mr. *Glasse* first of all pressed upon us this general proposition, that the Legislature cannot be supposed to have intended by 7 Vict. c. 12, s. 19, to repeal the statute 3 & 4 Will. 4, c. 15, which was so carefully preserved by the statute 5 & 6 Vict. c. 45. There is no such repeal. The statute of 3 & 4 Will. 4, c. 15, remains, and the statute 5 & 6 Vict. c. 45 remains, except so far as they are interfered with in a particular case for a particular purpose, and the particular purpose of sect. 19, beyond all doubt, is to induce foreign countries to give English authors of pieces first published in *England* rights similar to the rights given to their own people. The English Legislature, in substance, says to foreign Legislatures, "If you give rights to our people, we will give rights to your people; but if not, your people shall not have any rights whatever under our Copyright Acts or Acts of the nature of Copyright Acts." And in carrying out this, it treats the author of a book, or the author or composer of a dramatic piece or musical composition first published in a foreign country, whether he was naturalized there or not, as being for that purpose a foreign author or foreign composer. Therefore there is no repeal of the Act 3 & 4 Will. 4, c. 15. The 19th section of the *International Copyright Act* has a limited purpose only, expressed in terms shewing the meaning of the word "published," which must express something that can be predicated of a book, of a dramatic piece, of a musical composition, of a print or article of sculpture, or any other work of art; that is to say, its being made public by those means which are appropriate to the particular thing. A book is published by being printed and issued to the public; a dramatic piece or a musical composition is published by being publicly performed; a piece of sculpture or other work of art by being multiplied by casts or other

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copies. That, as it appears to me, is the natural meaning of the word "published" in that section, and that is the meaning attributed to it by the Vice-Chancellor. Mr. *Glasse's* main argument is that the word "published" has obtained with respect to dramatic representation a particular meaning affixed to it by previous decisions, and so affixed to it that we must hold a play not to have been published unless it has been printed. This requires us, in fact, to introduce into sect. 19 additional words to some such effect as this, "Provided always that with respect to any dramatic performance this section shall not apply unless it shall have been first printed and published out of Her Majesty's dominions." I quite agree with the decisions to which Mr. *Glasse* referred, but when we look at them they none of them really bear upon the meaning of the word "published" as used in what Mr. *Glasse* has called this code of laws. The cases referred to are cases in which the word "published" was used in the sense to which Mr. Justice *Compton* referred in *Jefferys* v. *Boosey* (1), *i.e.*, as meaning the being made *publici juris*, that is to say, being made the common property of everybody, so that the author has lost all exclusive right in this country. This is the effect of the cases from *Macklin* v. *Richardson* (2) down to *D'Almaine* v. *Boosey* (3), and they do not afford any interpretation of the word "published" which would enable us or entitle us in any way to construe the words of sect. 19 as having any other than the natural literal meaning which would be attached to them by an ordinary person understanding the English language and reading the section for the purpose of ascertaining what rights he would acquire under it. I am of opinion that the decision of the Vice-Chancellor is right.

Baggallay, J.A.

BAGGALLAY, J.A.:—

Having during a great part of the argument of this case entertained considerable doubt as to the correct view to be taken of it, I propose, now that I have come to the same conclusion as the Lord Justice, to add a few words as to the reasons which have influenced me. The Plaintiff insists that, being admittedly the author of the play in question, the protection claimed by him is

(1) 4 H. L. C. 815. (2) Amb. 694.
(3) 1 Y. & C. Ex. 298.

secured to him by the Act of the 3 & 4 Will. 4, c. 15, and that the remedies to which he is so entitled are not in any way affected by the statute 5 & 6 Vict. c. 45, or by the statute 7 Vict. c. 12. The Defendant, on the other hand, insists that, whatever might have been the rights and remedies of the Plaintiff, had the 7 Vict. c. 12, not been passed, the provisions of that statute are imperative, and apply to the case, and negative any such rights as those claimed by the Plaintiff.

The words of the 19th section of that Act, if taken by themselves, are very clear and distinct. [His Lordship read the clause.] The preamble of the Act states that under the then existing Acts, particularly the *International Copyright Act* (1 & 2 Vict. c. 59), Her Majesty had no power "to confer an exclusive right of representing or performing dramatic pieces or musical compositions first published in foreign countries upon the authors." Then it proceeds to make certain provisions, which, if complied with, would entitle the author of a dramatic piece to the exclusive performance of it, although it had been previously published. It is not suggested in this case that any of those provisions have been complied with, and we have, therefore, to consider the question, what is meant by the words "first published out of Her Majesty's dominions?" I do not think the difficulty is removed by going back to the statute of 3 & 4 Will. 4, c. 15, because all that we find there is that "from and after the passing of this Act the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed and not printed and published by the author thereof or his assignee, or which hereafter shall be composed and not printed or published by the author thereof or his assignee, or the assignee of such author, shall have as his own property the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever," the piece so composed. There, again, we have the same difficulty. We have no indication of what is the meaning of the word "published," as used in that Act of Parliament. We find in the passage which I have just quoted the words "published," "printed," and "represented" sometimes used with the conjunctive preposition and sometimes with the disjunctive. Therefore we are left to arrive at the best conclusion we

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can as to what is the meaning of the word "publication" in that statute. Some authorities have been referred to by Mr. *Glasse*, such as *Macklin* v. *Richardson* (1) and the subsequent case of *D'Almaine* v. *Boosey* (2), for the purpose of shewing that the mere representation on the stage was not a publication. Both of those cases were decided, one long before, and the other just before, the passing of the Act 3 & 4 Will. 4, c. 15; therefore they can give us no insight into the precise sense in which the words may have been used in that statute. Then comes the intermediate statute, the 5 & 6 Vict. c. 45; the 20th section of that Act made me for some time feel doubts as to the proper way of dealing with this case. That 20th section follows upon a previous section which had conferred on the authors of books an extended term within which they were to have copyright, and that extended term was to date from the period of the first publication of the book. Sect. 20 provides that the author of a dramatic piece shall have protection for a corresponding period. Inasmuch as it was necessary to introduce some definition for the purpose of explaining what was to be the commencement of the period this term is used. When it is said that the author of a dramatic piece shall have protection for the same term as that which the author of a book shall have, it becomes necessary to say what is to be deemed the first publication of a dramatic piece corresponding or equivalent to the first publication of a book. It was, therefore, provided that the first public representation or performance of a dramatic piece should be deemed equivalent, "in the construction of this Act," to the first publication of any book. At first it struck me that the use of the words "construction of this Act," instead of the words "for the purposes of this Act," was in favour of the Plaintiff, but further consideration has led me to think the contrary. If the words "for the purposes of this Act" had been used, it would have been implied that this meaning was to be attached to the words in that Act only, but the use of the words "in the construction of this Act" shews that the Legislature was merely introducing a definition of what was to be considered the first publication of a dramatic piece, when it was necessary to ascertain the term during which the dramatic right was to continue. As it now

(1) Amb. 694. (2) 1 Y. & C. Ex. 298.

appears to me, there is certainly no inference to be drawn that this meaning of the word "publication" was to be adopted only in the construction of that Act; but, on the other hand, in my view that clause throws considerable light on the meaning of the Legislature in using the words "first publication," by giving it a definition answering to what would ordinarily and usually be recognised as its meaning.

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It appears to me, therefore, having regard to the consideration which I have just now mentioned, that the 7 Vict. c. 12, s. 19, is imperative, and deprives the Plaintiff of any right, if he ever had any right, under 3 & 4 Will. 4, c. 15.

BRETT, J.A. :—

Brett, J.A.

After the arguments we have heard, it cannot be said that the interpretation of this statute is easy, but it seems to be admitted—at all events it cannot be denied—that if the word "published" is read in its ordinary sense as meaning "made public," the case is directly within the 19th section of 7 Vict. c. 12. Therefore the question must be whether the word "published" in that section is to be construed according to its ordinary comprehensive meaning, or is to have a limitation placed upon it. The limitation which must be put upon it, according to the argument which has been addressed to us on behalf of the Plaintiff, must be a somewhat extensive one—that with regard to English authors or composers of any dramatic piece or musical composition the word "published" is to be understood in the limited sense of published by printing.

Now, in order to come to a safe conclusion it is always necessary to consider the subject-matter with which we are dealing. The subject-matter here is a dramatic composition. A dramatic composition differs from many compositions in this, that it can be made use of in two different ways. It may be made use of by printing it, and distributing it as a written composition or a book. It may also be used by having it acted on the stage of a theatre. If the author be an Englishman, no doubt he has certain rights given to him by the statute 3 & 4 Will. 4, c. 15, but a foreign author has no rights at all under that statute. If, therefore, a foreign author's play was first acted abroad, he could not afterwards claim any

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protection in *England*. He would by acting it abroad have made it *publici juris* in *England*, and, therefore, anybody in *England* might act it here. It is said that an English author, although he allows his compositions to be acted abroad, does not come under the same difficulty, because he is protected by the statute of 3 & 4 Will. 4, c. 15. That may be, and although I have some doubts whether the limitation of the meaning of the word "published" which has been contended for applies even to that statute, I will assume that it does, and that an Englishman, although his piece was first acted abroad, could claim the protection given by the statute of 3 & 4 Will. 4, c. 15. A foreigner, however, certainly could not claim that protection. Then, if that be the state of things before the statute of 7 Vict. c. 12, we have two sets of people to deal with as regards dramatic compositions, that is, foreign authors who had no protection in *England*, and English authors who might first of all have their pieces acted abroad, and yet have protection under 3 & 4 Will. 4, c. 15. The statute of *Victoria* begins by giving the Queen power to give protection to foreign authors and dramatic composers, and that is done under sect. 5, which has regard to their protection against performances. Their protection against publication by printing is given to them under other sections. The 5th section provides that where the authors of dramatic pieces have first publicly represented or performed them in any foreign country the Queen shall have the power of giving them sole liberty of representing or performing the same in any part of Her Majesty's dominions. The statute is dealing with several kinds of things to be protected, which may be published in different ways, and with different persons, with foreigners and, as we shall presently see, with Englishmen. Then the 19th section provides in perfectly general words, "That the author of no dramatic piece or musical composition" which shall after the passing of this Act be first published out of Her Majesty's dominions shall have any copyright therein respectively, or any exclusive right to the representation or performance thereof, otherwise than such (if any) as he may become entitled to under this Act." Now, it is said that the word "published" ought to be restricted to the meaning which is said to have been affixed to it in the statute 3 & 4 Will. 4, c. 15. If so, the word "published," when

applied to English authors, must have one meaning, and another when applied to foreign authors under precisely similar circumstances. That seems to me to be contrary to the common canon of the construction of statutes, for it requires us to introduce into the statute the proviso that in the case of English authors representation out of Her Majesty's dominions shall not be considered a publication. That would be to introduce words which we have no right to introduce, unless there be something in the nature of the case which makes it obvious that such must have been the object of the Legislature. It is endeavoured to make out this to have been the object by saying that it is unjust to take away the right of an English author. I see nothing contrary to reason or justice in saying that if an English author chooses to go abroad and there represent, or allow to be represented, his composition for the first time, he shall be in the same position as a foreigner who has done the same thing. If that be so, the word "published" must have its natural construction, whether it is applied to the compositions of Englishmen or of foreigners. That ordinary meaning is "made public," and a dramatic composition is made public the moment it is represented or acted. If Englishmen have their plays first represented abroad, they are by this statute placed on the same footing as foreigners; if they have them first represented in *England* they do not come under this statute at all; but their rights will be governed by 3 & 4 Will. 4, c. 15, and 5 & 6 Vict. c. 45.

Solicitors: *Lewis & Lewis; Horace W. Chatterton.*

C. A. 1877 Feb. 2.

In re RIO GRANDE DO SUL STEAMSHIP COMPANY.

Winding-up—Lien of Master of Ship for Disbursements—Leave to proceed in Admiralty—Appeal for Costs.

T., the master of a ship belonging to a company, drew a bill on the company for necessaries supplied to the ship, which was accepted, but was dishonoured at maturity. *T.* paid the bill, and claimed repayment from mortgagees who had taken possession of the ship. On the following day an order was made for winding up the company. *T.* then applied in the winding-up for leave to take proceedings in the Admiralty Court, and obtained an order giving him leave. The liquidator applied to discharge this order, and an order was made for the liquidator to pay into Court to a separate account to meet *T.*'s claim a sum of £150, which exceeded the principal and interest, *T.* undertaking not to proceed in the Admiralty Court; the payment to be without prejudice to any application by *T.* to increase the amount. The £150 was paid in, and *T.* applied to increase the amount so as to cover the costs of defending an action brought against *T.* by the holder of the bill, and the costs of *T.* of the application in the winding-up. Vice-Chancellor *Bacon* ordered the principal and interest on the bill to be paid to *T.* out of the £150, and the residue to be paid to the liquidator:—

Held, on appeal, that though if there had not been mortgagees in possession of the ship the proper mode of enforcing *T.*'s lien on the ship would have been by application in the winding-up, as in *In re Australian Direct Steam Navigation Company* (1), the order giving leave to proceed in the Admiralty Court was a proper order, the mortgagees not being parties to the winding-up; and that *T.* was entitled to all his costs before the Vice-Chancellor as costs properly incurred by a mortgagee in enforcing his security:

Held, also, that the case was not within the rule that an appeal will not lie as to costs.

Statement.

IN July, 1875, *Turner* was master of the steamship *Conde d'Eu*, of which the *Rio Grande do Sul Steamship Company* were the owners, and which was on a voyage from *Rio Grande do Sul* to *London*. At *Santa Cruz* he drew on the company, for necessaries supplied to the ship there, a bill for £126 9*s*., and delivered it to the firm who supplied them. The bill was accepted on the 4th of August, 1875. It became payable on the 6th of September, 1875, and was then dishonoured. *Turner*, who was then in *London*, received notice of dishonour, and was applied to for payment. He declined to pay, but an action having been commenced against him, he was advised that he had no defence, and on the 17th of

(1) Law Rep. 20 Eq. 325.

September he paid £129 6*s.* 5*d.* for principal, interest, noting, and costs.

In the meantime, *Hamilton & Co.*, who were mortgagees of the ship under a mortgage of the 5th of June, 1875, had taken possession of her. On the 20th of September, *Turner's* solicitors wrote to them asking for repayment of the £129 6*s.* 5*d.*, and stating that in default they should take proceedings to arrest the ship.

On the 21st of September, 1875, an order was made for winding up the company, and on the 23rd of September, in answer to the letter of the 20th of September, a letter was sent (on whose behalf did not clearly appear), referring to the case of *In re Australian Direct Navigation Company* (1). *Turner* thereupon applied in Chambers for leave to take proceedings in the Court of Admiralty to arrest the ship, and on the 1st of October, 1875, an order was made giving him leave to proceed in the Admiralty Court.

The liquidator moved to discharge or vary this order, and on the 5th of October, 1875, *Turner* undertaking not to proceed in the Admiralty Court, it was ordered that the official liquidator should, within ten days after receipt by him of a sufficient sum out of the first moneys that should come to his hands, pay into Court £150 to a particular account to answer *Turner's* demand, such payment to be without prejudice to any application by *Turner* to increase the amount in case it should be insufficient to satisfy his claim.

On the 1st of March, 1876, £150 was paid in pursuant to this order.

In August, 1876, *Turner* took out a summons asking that the sum might be increased to an amount sufficient to meet the following costs:—1, costs in defending the action by the bill-holder; 2, the applicant's costs of and incident to the summons on which the order of the 1st of October, 1875, was made, and of the order of the 5th of October, 1875, and that such costs might be taxed and added to the claim on the bill, and that the company might be ordered to pay the costs of that application.

This summons was adjourned into Court, and on the 23rd of November, 1876, Vice-Chancellor *Bacon* made an order that out of the £150 in Court the £129 6*s.* 5*d.*, with £8 6*s.* 5*d.* for interest

(1) Law Rep. 20 Eq. 325.

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up to the 31st of December, 1876, should be paid to *Turner*, and the residue paid to the official liquidator.

Turner appealed.

Argument.

Fischer, Q.C., and *Stirling*, for the Appellant:—

The captain was entitled to indemnity against the consequences of his accepting the bill, and, therefore, to all costs properly incurred by him in proceedings relating to it. He was first incumbrancer on the ship, but could not take proceedings against it without leave; his application for leave was therefore regular and proper: *Addison* on Contracts (1); *Smith* v. *Howell* (2); *The Bold Buccleuch* (3); *The Mary Ann* (4); *The Feronia* (5). Though costs only are in dispute, an appeal will lie: *Cotterell* v. *Stratton* (6).

Kay, Q.C., and *Speed*, *contrà*:—

This is an appeal for costs, and ought not to be allowed. The Vice-Chancellor held the application for the order of the 1st of October, 1875, irregular and improper: *In re Australian Direct Steam Navigation Company* (7). At all events, no costs of defending the action on the bill ought to be allowed, the liability of the captain as drawer being quite clear.

Judgment, James, L.J.

JAMES, L.J.:—

I am opinion that though this decision relates to costs, it involves a question of law and principle, and is subject to appeal. The Appellant, as surety, drew a bill of exchange on the company for disbursements properly made by him on behalf of the ship. It cannot be disputed that he had a right of action against the company and a lien on the ship. As the ship was mortgaged, and in the possession of the mortgagees, it was a matter of importance to him to insist on this lien. He pays the bill, and is minded to proceed in the Admiralty Court to enforce it. In this state of things he receives a letter from the solicitors of the mortgagees or of the company, calling his attention to the case of *In re Australian Direct Steam Navigation Company*, in which the Master of the

(1) Pages 54, 716.
(2) 6 Ex. 737.
(3) 7 Moo. P. C. 267.
(4) Law Rep. 1 A. & E. 8.
(5) Ibid. 2 A. & E. 65.
(6) Ibid. 8 Ch. 295.
(7) Law Rep. 20 Eq. 325.

Rolls had held that where a company is in course of being wound up it is not right to take proceedings in Admiralty to enforce a claim against one of the ships of the company, but the proceedings ought to be had before the Judge to whose Court the winding-up is attached. The Appellant acted on this, and took out a summons in accordance with the view of the Master of the Rolls, but as the mortgagee was not a party to the winding-up, and the Court had no jurisdiction to summon him before it, the summons took the form of an application for leave to proceed in Admiralty. An order was made accordingly on the 1st of October, 1875, and notwithstanding what is stated to have been said by the Vice-Chancellor as to that order, I am of opinion that it was the right order to be made unless the company was able and willing to give the applicant sufficient security for the amount of his debt and costs, charges, and expenses. The costs of obtaining that order were costs incurred by him as a mortgagee. The company applied to discharge that order, it was not in fact discharged, and, in my judgment, any order discharging it as wrong would have been erroneous, but a course was adopted which could not have been adopted but by consent. It was represented that the liquidator would soon have money in hand, so an order was made that he should set apart £150 to meet the Appellant's claim, without prejudice to any application to increase the sum. That is so far from being a decision that the first order was incorrect, that it must have gone on the footing of its being correct, for the Appellant thus obtained substantially the same remedy as he would have obtained in the Court of Admiralty. In the Court of Admiralty he would have obtained his debt and costs, charges, and expenses, and he must have the same relief here. The order must be varied by giving the Appellant all the costs before the Vice-Chancellor and his costs here. As to the costs of defending the action on the bill, and taking advice with respect to it, he can only be allowed 6*s.* 8*d.*, his liability having been clear.

Brett, J.A.:—

I agree that 6*s.* 8*d.* is all that can be allowed for taking advice, and that the Appellant cannot be allowed any costs of defending the action on the bill, his liability having been clear. According to

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The Feronia (1) he had a lien on the ship for the amount of the bill, for when he paid it he was placed in the same position as if he had paid for the disbursements at the time. This lien had priority over the claim of the mortgagees, but the only Court in which it could be enforced was the Court of Admiralty. Had he proceeded in that Court he would have recovered the amount of his disbursements and his costs, charges, and expenses. Then came the winding-up. Had there not been mortgagees in possession, the case would have been within the authority of *In re Australian Direct Steam Navigation Company* (2), and the case might have been disposed of entirely in the Court of Chancery. But the title of the mortgagees makes a great difference. As they were not subject to the jurisdiction of the Court, entire justice could not have been done in the Court of Chancery. In such circumstances the proper course is to apply in the winding-up for leave to take proceedings in the Court of Admiralty. The order of the 1st of October, 1875, was, therefore, right. The liquidator applied to the Vice-Chancellor to vary it. Apart from any arrangement, the only proper course would have been to affirm it, but an order was made which practically was a consent order, by way of indulgence to the liquidator, that no proceedings in Admiralty should be taken, a sum of money being brought into Court, leaving it open whether the sum was sufficient to meet what the Appellant would have got in the Admiralty Court. He would there have obtained all the costs properly incurred in realizing his security, and he must have the same here. This is a question of law, not a question about costs which are in the discretion of the Judge.

Amphlett, J.A. AMPHLETT, J.A.:—

I am of the same opinion.

Solicitors: *Barnes & Bernard; Nicol, Son, & Jones.*

(1) Law Rep. 2 A. & E. 65. (2) Law Rep. 20 Eq. 325.

GORDILLO *v.* WEGUELIN.

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1876
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Nov. 10.
C. A.
1877
Feb. 3, 5.

[1876 G. 208.]

Loan repayable by Drawings—Drawn, but Unpaid Bonds—Arrears of Interest —Redemption.

A loan was secured by the issue of bonds bearing coupons for twenty half-yearly payments of interest, on the 1st of June and 1st of December, such bonds to be redeemable by half-yearly drawings of at least 5 per cent. on the total amount of the loan. A deed was executed, by which the borrowers granted certain foreign railways to trustees, and covenanted with them to remit half-yearly sums sufficient to pay the amount of interest and moneys required for redemption. On each 1st of December and 1st of June the moneys so to be remitted were to be applied in payment of the principal sums secured by such of the bonds as should have been drawn on the preceding 1st of November and 1st of May, as the case might be, and of the interest on such of the bonds as should be outstanding and bearing interest which would become payable on such 1st of December or 1st of June, but it was declared that no interest should be payable on any drawn bond after the day fixed for its redemption. In case of default in the remittances, the trustees were to enter into possession of the railways, and apply the net profits (1) in payment of all arrears of interest due on such of the bonds as should be outstanding and bearing interest; (2) in redemption of such an amount of bonds as ought to have been redeemed on any previous 1st of June or 1st of December, but might not have been redeemed through failure of the borrower to remit funds, and lastly in payment of the future interest on the bonds and the redemption of the same in any future half-year; and after full payment and satisfaction of all the principal moneys and interest secured by the bonds, the trustees were to hold the surplus in trust for the borrowers. Default was made in the remittances, the trustees took possession, and in November, 1876, had a fund in hand out of which they proposed to pay interest on the undrawn bonds only. Bonds to the amount of 10 per cent. on the whole loan had been drawn in November, 1875, and May, 1876, but had not been paid through want of funds:—

Held, by the Master of the Rolls, that no interest was payable on any bond drawn for payment after the day fixed for its redemption, and that the trustees therefore could not be restrained from applying the moneys in their hands in payment of interest on the undrawn bonds, making no provision for interest on drawn bonds which remained unpaid through want of funds:—

Held, on appeal, that drawn bonds which remained unredeemed through failure of the borrower to provide funds, could only be redeemed by payment of the principal with interest up to the time of payment:—

Held, by *James*, L.J., and *Amphlett*, J.A., that the funds were to be

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applied in the first place in payment of interest *pari passu* on undrawn bonds, and on drawn bonds which remained unpaid through the failure of the borrowers to provide funds; *dissentiente Brett*, J.A., who was of opinion that the payment of interest on undrawn bonds had priority over the payments in redemption of drawn bonds.

Statement.

BY an indenture, dated the 28th of June, 1872, between *Montero Brothers* of the one part, and *Weguelin & De Gessler* of the other part, reciting concessions from the Peruvian Government to *Montero Brothers* for the construction of certain railways, and reciting that *Montero Brothers* had made arrangements with *Thomson & Co.* for the issue of a public loan of £1,000,000 in mortgage bonds; and that it was intended that the bonds should be in the form in the schedule, and that the principal should be payable in ten years from the 1st of November, 1872, at latest, by means of semi-annual payments of sums at least equal to £5 per cent. on the nominal amount of the loan; and that it was intended that the bonds to be redeemed in each half-year should be determined by drawings to take place on or before the 1st of May and the 1st of November in each year, and that the bonds drawn for redemption should be redeemable on the following 1st of June and 1st of December in each year; *Montero Brothers* transferred the concessions, with the railways, rolling stock, &c., to *Weguelin & Gessler*, upon the trusts thereinafter declared, and also covenanted with them as follows:—

"1. Messrs. *Montero Brothers* will, on or before the 27th day of each month, commencing from the 27th of October, 1872, pay in cash or approved bills on *London*, to the special receiver in *Lima*, appointed by the contractors on behalf of the bondholders, such a sum as will be equal to one-sixth part of the amount required for each half-yearly service of the loan respectively, including the commission payable to the contractors, so that there shall be in the hands of the contractors in *London* such sum or sums of sterling money as shall on the 1st day of May and the 1st day of November in each year, while any part of the loan remains unpaid or outstanding, be sufficient to meet the half-yearly service of the interest and redemption of the loan, together with the commission of 1 per cent. on the said service payable to the contractors, so that the payment of the interest and the performance

of the redemption of the principal of the said loan by payment of the drawn bonds may be at all times duly effected.

"2. The sum so to be remitted to the contractors as aforesaid shall be applied in payment at the counting-house of the contractors in *London* on the 1st of June, 1873, of the half-yearly interest on the said mortgage bonds which will become payable on the 1st of June, 1873, upon presentation, and against delivery of the corresponding coupon; and the sums so to be remitted as aforesaid shall be applied in payment at the counting-house of the contractors in *London* on the next following 1st of December and 1st of June (as the case may be) of the principal sums secured by such of the said mortgage bonds as shall have been drawn for redemption on the preceding 1st of November and 1st of May (as the case may be), upon presentation, and against delivery of the bonds so drawn, and of the half-yearly interest on such of the said mortgage bonds as shall be outstanding, and bearing interest which will become payable on such 1st of December or 1st of June (as the case may be), upon presentation, and against delivery of the corresponding coupon. But no interest shall be payable on any drawn bond after the day fixed for its redemption. Provided always, that Messrs. *Montero Brothers* may, on the 1st of June or the 1st of December in any year, redeem any larger amount than 10 per cent. of the said mortgage bonds, and for that purpose may cause any larger number of bonds than as hereinbefore provided to be drawn for redemption on or before the 1st of May or the 1st of November in any year.

"3. The said semi-annual drawings shall take place in *London* in the presence of agents of Messrs. *Montero Brothers* and of the contractors respectively, and of a notary public, and the numbers of bonds drawn for redemption shall be advertised in one daily newspaper, published in *London*, immediately after each semi-annual drawing shall have taken place. And such advertisement shall also state that the sums applicable for the redemption of the drawn bonds and the payment of the half-yearly interest on the outstanding bonds have been duly remitted by Messrs. *Montero Brothers* to the contractors, pursuant to the covenant in that behalf hereinbefore contained."

"8. The payment of the principal moneys and interest to be

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secured by the said mortgage bond shall be and remain a first charge on all the said premises expressed to be hereby granted assigned, and transferred."

Clause 9 provided that in case of any default in payment by *Montero Brothers*, the trustees should take possession of the transferred property and the works, and continue in such possession and in the receipt of the profits, until all such sums as should for the time being be in arrear should have been paid by means of such receipt of profits, and for such further time as should seem to the trustees expedient for securing the payment by *Montero Brothers* of any future sums to become payable by them under the covenants.

Clause 10 gave the trustees power to appoint a receiver.

"15. The said trustees or trustee for the time being of these presents shall, out of any moneys which shall come to their or his hands, or to the hands of any such receivers or receiver as aforesaid, in the first place pay all the costs, charges, and expenses of maintaining and working the said railway so long as they or he shall remain in possession or receipt of the rates, tolls, dues, and profits thereof; and in the next place pay and retain all the costs, charges, and expenses to be incurred or sustained by them or him in or about the receipt of the said profits, or the exercise or execution of any of the powers or trusts of these presents, including remuneration hereafter provided for the said trustees or trustee, and the remuneration of such receivers or receiver as aforesaid; and shall apply the residue of the said moneys in or towards payment of the principal moneys and interest secured by the said mortgage bonds in the following order (that is to say), first, in payment of all arrears of interest actually due on such of the said bonds as shall be outstanding, and bearing interest; secondly, in redemption of such an amount of the said mortgage bonds as ought to have been redeemed on any previous 1st of June or 1st of December, but may not have been redeemed in consequence of any default of Messrs. *Montero Brothers* to provide the necessary funds for that purpose pursuant to their aforesaid covenant in that behalf; and, lastly, in the payment of the future interest on the said bonds, and the redemption of the same in any

future half-year, in manner hereinbefore provided; and after full payment and satisfaction of all the principal moneys and interest secured by the said mortgage bonds, the trustees or trustee shall hold the surplus (if any) of the said moneys so to be received by them or him as aforesaid in trust for Messrs. *Montero Brothers*, their heirs and assigns: Provided always, that the said trustees or trustee may, either themselves or himself, apply any moneys in their or his hands in payment of the principal moneys and interest secured by the said mortgage bonds, or may pay the said moneys to the contractors, to be applied for that purpose without seeing to the application of the moneys so paid to the contractors, or being in anywise liable for the non-application or misapplication thereof, and may allow to the contractors a commission of 1 per cent. on the total amount of the moneys so applied by them."

The material parts of the form of bond were as follows:—

"£7 per cent. loan of £1,000,000 sterling.

"The bearer of this bond is entitled to £ , part of the said loan, the principal and interest whereof is secured by a mortgage of the above-mentioned concessions and the said railways, with their rolling stock and appurtenances, effected by a deed dated the 28th of June, 1872, and made between Messrs. *Montero Brothers* of the one part, and *C. Weguelin* and *A. de Gessler* of the other part.

"The principal of this loan is payable in twenty instalments of £50,000 by means of semi-annual drawings, with liberty for *Montero Brothers* to increase the amount of any semi-annual instalment; and the interest thereon is payable semi-annually on the 1st of June and the 1st of December in each year, according to the annexed coupons.

"Messrs. *Montero Brothers* hereby bind themselves, their heirs, representatives, estates, and effects with the payment to the bearer of this bond of the principal sum of £ on the 1st of June or the 1st of December (as the case may be) next following the day on which this bond shall be drawn, for redemption upon presentations and against delivery of this bond; and also of interest on the principal sum of £ at the rate of £7 per cent. per annum semi-annually on every 1st of June and 1st of De-

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cember up to and including the day on which the said principal sum shall become payable upon presentation, and against delivery of the corresponding coupon."

Each bond had coupons attached to it for the payment of interest thereon at £7 per cent. per annum, to become due each half-year during the term of ten years.

The whole of the bonds were taken up by the public.

In March, 1875, default was made in the remittances necessary to meet the payments in respect of the loan, and in the following month the trustees entered into possession.

Bonds to the amount of £50,000, including bonds held by the Plaintiff to the amount of £3300, were drawn for payment in May, 1875. The coupons due on the 1st of June, 1875, on all the unpaid bonds were paid in due course. The bonds drawn in May were paid on or after the 24th of September, 1875 without any further interest.

Another half-yearly drawing was held in the same year, and the numbers of the bonds drawn were advertised in November. Of the £50,000 of bonds then drawn, the Plaintiff was holder of £3600. The coupons due on the 1st of December, 1875, on all bonds, including those drawn in November, were paid on the 6th of January, 1876; but the principal of the drawn bonds remained unpaid.

Another drawing of bonds to the amount of £50,000 took place in May, 1876, and bonds of which the Plaintiff was holder were drawn to the extent of £4100.

Doubts being entertained as to the rights of the holders of drawn bonds, the Plaintiff commenced this action on behalf of himself and all other the holders of unpaid drawn bonds, against the trustees, the owners of the railway, and a holder of undrawn bonds as representative of the persons similarly circumstanced, to have the rights determined.

The case came on for hearing before the Master of the Rolls on the 10th of November, 1876.

Chitty, Q.C., and *Everitt*, for the Plaintiff.

Fry, Q.C., and *J. T. Prior*, for the trustees.

Cookson, Q.C., and *W. D. Rawlins*, for a holder of undrawn bonds. C. A. 1877 GORDILLO v. WEGUELIN.

Davey, Q.C., and *Stirling*, for the assignees of *Montero*.

W. J. H. Clark, for other parties.

The MASTER OF THE ROLLS made an order stating the opinion of the Court, that no interest was payable under clause 15 on any bond drawn for payment after the day fixed for its payment, and refused an injunction to restrain the trustees from applying the money in hand in payment of interest on undrawn bonds without providing for the payment of interest and arrears of interest on bonds drawn but not paid. Judgment, M. R.

The Plaintiff appealed from this decision. The appeal was heard on the 3rd and 5th of February, 1877. C. A.

Chitty, Q.C., and *Everitt*, for the Plaintiff:— Argument.

We contend that interest runs upon a bond until it has been drawn and notice given that funds are ready for its payment. The bonds are called "mortgage bonds," and the payment of them is secured by a mortgage. They have coupons for the ten years, and "redemption" is the word used throughout with respect to them. There is nothing in the deed to contract us out of our right to interest until payment: *Price* v. *Great Western Railway Company* (1); *Morgan* v. *Jones* (2); *Cook* v. *Fowler* (3). Whatever be the nature of a mortgage, whether legal or equitable, it always carries interest: *In re Kerr's Policy* (4); *Carey* v. *Doyne* (5). The trustees of the mortgage are bound to hold the property till all the persons interested in the mortgage money have been paid their principal and interest. Clause 2 proceeds on the assumption that there are funds in hand to pay the drawn bonds, and does not apply until that is the case. We also ask the Court to decide that there is no ground for postponing the interest on the drawn bonds to the current interest on the undrawn bonds. Whatever fund

(1) 16 M. & W. 244.
(2) 8 Ex. 620.
(3) Law Rep. 7 H. L. 27.
(4) Ibid. 8 Eq. 331.
(5) 5 Ir. Ch. Rep. 104.

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there is applicable to payment of interest should be applied rateably to all the interest due.

Cookson, Q.C., and *W. D. Rawlins*, for the holders of undrawn bonds:—

Reading the bond by itself interest is made payable only up to the time when the principal becomes payable. Anything that could be recovered beyond that time is only in the nature of damages, not of interest secured by the bond. Clause 15 of the deed provides for payment of interest on all bonds "outstanding and bearing interest." We must look to sect. 2 to see in what sense these words are used. That section provides that no interest shall be paid on any drawn bond after the day fixed for its redemption. A bond drawn is therefore not a bond outstanding and bearing interest. If, however, the holders of drawn bonds are entitled to something in the place of interest, we contend that it must be postponed to the interest on undrawn bonds, for by clause 15 current interest has priority over the principal of drawn bonds.

Fry, Q.C., and *J. T. Prior*, for the trustees, asked the Court to settle the question as to the priority of interest on undrawn bonds over interest on drawn bonds in case it should be held that the latter carried interest.

Stirling, for the owners of the railway:—

We are a Peruvian company, and the terms on which we can recover possession of our property in *Peru* may be very different from those which the English Courts would impose on an English company. As soon as the sums provided for by the deed have been paid to the trustees we shall have a right to resume possession, and the Court here can only administer the fund which we are bound to pay, and nothing that can prejudice our rights in *Peru* ought to be decided here. But taking the case according to English law, interest runs only up to the day appointed for payment. Anything further is only in the nature of damages: *Cook* v. *Fowler* (1); and the proper interest only is chargeable against the estate.

(1) Law Rep. 7 H. L. 27.

Everitt, in reply:—

I contend that interest on the drawn but unpaid bonds is payable *pari passu* with the interest on undrawn bonds. Negative words as to interest are inserted in clause 2, but are carefully omitted from clause 15. The fair construction is, that interest ceases to be payable on a bond as soon as it has been drawn and notice has been given that funds are ready for its payment.

JAMES, L.J.:— Judgment, C. A. James, L.J.

I am of opinion in this case that the order of the Master of the Rolls must be varied.

The question is, how the funds applicable for the payment of the principal and interest secured by mortgage bonds ought to be applied. An issue of £1,000,000 7 per cent. debentures was secured by way of mortgage, and it was further provided that the mortgagees were either to be liable or to be entitled to be paid off by semi-annual drawings of not less than £50,000 each, extending over a period of ten years. The mortgagors were bound to provide, and were entitled to provide the money for that redemption of principal. The bonds are in the usual form of debenture bonds of that kind. They are bonds for particular sums with coupons annexed, extending over ten years. The bonds appear on the face of them to be bonds for certain sums bearing interest up to the end of the ten years. By the deed, in order to secure the re-payment of the principal and interest, the concessionaires assign the undertaking to trustees. The concessionaires agree that money shall be always forthcoming in the hands of the *London* contractors for the purpose of paying the interest and the semi-annual drawings of the principal. The first part of the arrangement is an undertaking by which they bind themselves absolutely to find the interest and so much of the principal as is represented by the bonds drawn. Then let us look at clause 3, which in point of chronological order ought to be read before clause 2. It prescribes the mode in which the semi-annual drawings shall take place, and directs an advertisement of the result to be published, after which follow words which appear to me very important: "And such advertisement shall also state that the sums applic-

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able for the redemption of the drawn bonds, and the payment of the half-yearly interest on the outstanding bonds, have been duly remitted by Messrs. *Montero Brothers* to the contractors pursuant to the covenant in that behalf hereinbefore contained." That being so, then the sum so remitted to the contractors is to be applied first of all in payment of all interest upon the mortgage bonds which would become payable on the 1st of June or the 1st of December, as the case may be, and then in payment "of the principal sums secured by such of the mortgage bonds as shall have been drawn for redemption on the preceding 1st day of November or the 1st day of May (as the case may be), and of the interest upon such of the said mortgage bonds as shall be outstanding and bearing interest which will become payable on such 1st of December or 1st of June (as the case may be). But no interest shall be payable on any drawn bond after the day fixed for its redemption." We therefore start with this: The contractors are to say they have got the money in their hands. The holder of a bond which has been drawn is to bring it there on the day and tender it, and to receive his principal in exchange. His interest of course, will be paid in exchange for the coupon. The outstanding bonds in that case would be the outstanding bonds other than the bonds which have been drawn and have been paid, or ought to have been presented for payment. Then there is a special clause applicable to that state of things: "But no interest shall be payable on any drawn bond after the day fixed for its redemption," evidently implying that but for that clause the interest would have gone on. That would be perfectly right on the assumption that the funds are there for payment of the bond, the holder ought to tender the bond for payment, and he could not be allowed to go on getting interest against his debtor after the time had arrived when he was bound to accept repayment, and the debtor had provided the requisite funds. On the assumption that the directions of clause 3 have been complied with the negative clause is quite according to the honesty and common sense of the transaction.

Then what is to be done in the case which has happened—that the debtors do not find the money? In that case not the contractors but the mortgagees, who have the land vested in them as

trustees for the debenture holders, are to take possession of the property, receive the rents and profits, and pay all the working expenses, charges, &c., and then what are they to do? They are first of all to pay all arrears of interest actually due on such of the bonds "as shall be outstanding and bearing interest." Now the words "bonds outstanding and bearing interest," to my mind, are plain words. The bondholder says, "Pay me the interest on my bond;" the trustee answers, "I have only to pay interest on outstanding bonds." The bondholder replies, "It is outstanding; it is in my hands, and I have got the coupons on it. This is a bond not paid, the coupon is not discharged, released, or satisfied in any way. It is a bond outstanding, not only *de facto* but also *de jure*, because you have not taken the proper steps to take it out of my hands." It is a bond outstanding in the hands of the lawful holder, which he is entitled to use according to its terms; that is, a bond with coupons to be paid on particular days.

It appears to me, therefore, that a bond drawn and not paid through the default of the contractors or the insufficiency of the funds to discharge it, and outstanding by reason of that, is exactly in the same position as an undrawn bond for the purpose of paying interest. The trustees, I understand, desire us to determine that point, from which it will follow, according to my view of the case, that the interest is payable rateably on undrawn bonds and bonds drawn but remaining unpaid through default of the contractors or insufficiency of funds.

But probably it would have been sufficient to rest the case on the 2nd clause. I am quite satisfied that it would be impossible according to any principle upon which this Court acts in cases of redemption, to say that bonds could be taken out of the hands of the holder until he had been paid principal and interest, and that which is called damages or interest by way of damages (it does not signify which) up to the day of payment. It appears to me that this must be the meaning of the deed, for if payment of principal and interest merely means payment of the principal with interest up to the time of drawing, and not afterwards, although there be no principal forthcoming at the time of drawing, the mortgagors would gain a benefit from their own default, because the deed provides that "after full payment and satisfaction of all

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the principal moneys and interest secured by the said mortgage bonds," the trustees are to hold the surplus in trust for the mortgagors, their heirs and assigns. Moreover, if that view were adopted and carried to its consequences, the debtors might become entitled to redeem the property on payment of the principal with half a year's interest. By clause 2 they may "on the first day of June or the 1st day of December in any year redeem any larger amount than 10 per cent. of the said mortgage bonds, and for that purpose may cause any larger number of bonds than as hereinbefore provided to be drawn for redemption on or before the 1st of May or the 1st of November in any year." According to that they might cause any number, the whole if necessary, to be drawn upon the 1st of May or the 1st of November, when there would be no fund applicable for their payment, and say that there was no interest payable from that time. I cannot draw any limit. If a tenth part or a twentieth part does not bear interest, any additional number which they may choose to have drawn must cease to bear interest in exactly the same way.

I am of opinion that upon the whole deed what was intended was that the interest should run until the bond was paid, or until it was payable according to the terms of the deed, that is *de facto* payable out of funds provided for that purpose. When the bonds were in truth payable, not payable in the sense of the money being recoverable in an action at law, or anything of that kind, but payable by reason of the fund being provided for the purpose of paying them, either in the hands of the contractors or received by the trustees, then the interest would cease, and until it was so payable in truth and in fact, as well as in legal right of action, the interest runs.

Brett, J.A. BRETT, J.A.:—

I agree that the order, so far as relates to the point which the Master of the Rolls decided, must be altered, but as to the point which the Master of the Rolls did not decide, but upon which we are asked to give an opinion, I unfortunately differ from the Lord Justice.

The questions here arise not in an action or suit simply between the mortgagor and the mortgagee, the question I am now dealing

with being how and in what order the trustees mentioned in this deed are to apply the funds in their hands. That depends upon the construction of sect. 15. But in order to construe sect. 15, it seems to me to be necessary to see in what sense the expressions used in that section are used in other parts of the deed.

Now there are two words in this deed which seem to me to require careful attention—the word "outstanding" and the word "redeemed," or its equivalent "redemption." I cannot think that either of them is to be construed according to its ordinary conversational meaning. They are both to be construed according to the way in which they are used in this deed.

With regard to the word "outstanding" it seems to me that the best way to arrive at its meaning in sect. 15 is to look at its meaning in sect. 2. With regard to the word "redemption," or the word "redeemed," it is necessary not only to look at the mode in which these words are used in sect. 2, but also to the mode in which they are first used, or one of them is first used, in sect. 1.

First, then as to the meaning of the word "outstanding," we find that clause 2 deals with the mode in which money that has been remitted to the contractors is to be applied. It is first to be applied in payment of the first coupons becoming due under the deed, that is the coupons falling due on the next following 1st of December, or the 1st of June, as the case may be, and then "of the principal sums secured by such of the said mortgage bonds as shall have been drawn for redemption on the preceding 1st of May, and the 1st of November, as the case may be." Before the first coupons become due there is to be a drawing.

Now, it seems to me that under clause 2 the bonds are divided into two classes, which are described by two different phrases. The first class consists of "such of the said mortgage bonds as shall have been drawn for redemption on the preceding 1st of November or 1st of May, as the case may be." There is a subsequent clause in that section which applies to these bonds, namely: "but no interest shall be payable on any drawn bond after the day fixed for its redemption." That calls upon us to consider what is the meaning of the word "redemption." The second class, which as it seems to me includes all the rest of the bonds, is "such of the mortgage bonds as shall be outstanding and bearing interest which

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will become "payable" (that is which interest will become "payable) "on such 1st of December or 1st of June, as the case may be." Therefore, all the bonds included in the deed are divided into two sets, one of which sets is described as the mortgage bonds which have been drawn for redemption and the other as the bonds "which shall be outstanding and bearing interest." It seems to me that one of those descriptions excludes the other, that there are the bonds which have been drawn, as to which it is said that no interest shall be payable on any such bond after the day fixed for its redemption, whatever day that may be, which I will consider presently, and the others are the bonds which have not been drawn, and which are described under this phraseology—outstanding and bearing interest, that is they have not been drawn, and therefore are not within the negative clause. What then is the meaning of the expression "the day fixed for its redemption." I conclude, on the best consideration I can give, that the day fixed for its redemption means the day on which it is appointed to be paid, because if we look back to the recitals, we find a statement that it is intended that the principal due on the mortgage bonds "shall be payable in ten years from the 1st of November, 1872, by means of semi-annual payments" not semi-annual redemptions. But the very next recital is: "And whereas it is further intended that the bonds to be redeemed in each half-year shall be determined by drawings." There the word "redeemed" is the description of that which has been described in the previous clause as "payable." Therefore "redeemed" there means "paid." Then, as it seems to me, in section 2 "the day fixed for its redemption" means the day upon which it is made payable, *i. e.*, the day month after it has been drawn, we have then, in clause 2, the bond divided into two classes—bonds drawn which are to be paid the day month after they are drawn with interest up to that day, but with no interest after that day, and bonds not yet drawn and which are described as "outstanding and bearing interest," and if that clause were not controlled by any other, I should agree with the Master of the Rolls, that it prevented any payment of interest after the day upon which the bond was payable.

But then we come to sect. 15, which deals with the case of the default of the contractors to pay either the drawn bonds or the

interest on the undrawn bonds. In that case, money in the hands of the trustees, but which has not been in the hands of the contractors, is (after payment of costs), to be applied "in or towards payment of the principal moneys and interest secured by the said mortgage bonds." That includes all the mortgage bonds. Then it is provided that it is to be applied in the following order:— "First, in payment of all arrears of interest actually due on such of the said bonds as shall be outstanding and bearing interest." Those are the exact words which have described the second class in sect. 2. If that expression in sect. 2 meant undrawn bonds, it seems to me that it would be wrong to construe it to mean any different thing in sect. 15. If so, then the arrear of interest on the undrawn bonds must be paid first. "Secondly, in redemption of such an amount of the said mortgage bonds as ought to have been redeemed on any previous 1st of June or 1st of December, but may not have been redeemed in consequence of any default" in providing the necessary funds for that purpose. Now, I have said that in sect. 2 the word "redeemed" meant paid on the day month after the bond was drawn. If so, this is a description of the first class of bonds in sect. 2, viz., the bonds which have been drawn. The trustees then are in the second place to apply the money in their hands in redemption of such bonds as were drawn on the 1st of May or the 1st of November before that 1st of June or 1st of December. Those words, therefore, apply to the drawn bonds, the same division being made in sect. 15 as in sect. 2. If it were not for the use of the words "in redemption of," I should have thought that these drawn bonds would have borne no interest at all; and as for interest in its proper sense, I consider that they do not, for the words "No interest shall be payable upon any drawn bond after the day fixed for its redemption" must apply to them. But it is directed that the money shall be applied "in redemption of" and not "in payment of" these bonds, and I think that the words "in redemption of" do not merely mean payment, but mean redemption in its equitable sense, and that the debtors taking up these bonds must redeem them on the ordinary terms, that is to say, they must pay the principal not with interest as interest, but with the damages which a jury would give instead of interest. In a Court of Equity it is

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not called damages, but it is called interest, or more properly speaking perhaps, redemption money. So that there ought to be paid on these drawn bonds not only the principal, but also interest, not in its strict sense, but in its equitable sense, as compensation for the delay in paying beyond the day fixed for the payment.

It seems to me to follow that the order of payment is first to pay the interest which is due on undrawn bonds; next to redeem the drawn bonds by paying the principal and that sum which is equivalent to the interest. I therefore, as it must be seen, agree that the judgment of the Master of the Rolls cannot stand, but I differ from the Lord Justice so far that I consider that by sect. 15 priority is given to the interest due on undrawn bonds over the payments to be made in redemption of the drawn bonds.

phlett, J.A. AMPHLETT, J.A. :—

I agree with my learned Brothers that the order of the Master of the Rolls cannot be sustained, and as on the subordinate point I have to decide between the high authority of my two learned Brothers, I must say that I entirely agree with the judgment of the Lord Justice.

In order to construe this deed properly—for it is upon the construction of the deed that the question depends—it will be desirable, in the first place, to put a construction on the bond. Now each bond states that the sum for which it is given is part of a loan which has been secured upon the railway undertaking by means of the deed which we have to construe. Then it provides that the principal sum on the bond is to be paid by semi-annual drawings, and *Montero Brothers* bind themselves to pay the principal of the bond as it shall be drawn for redemption, and also to pay the interest on the principal sum at the rate of £7 per cent. per annum semi-annually on the 1st of June and the 1st of December up to and including the day upon which the said principal sum shall become payable. Now I quite agree with what the Lord Justice has said, that having regard to the context of that bond, and having regard to the fact that it refers to the deed, the word "payable" must be construed with reference to the deed not as meaning payable in the sense that an action might be brought for the money, but payable in the manner directed by the

deed. Now the deed presumes that everything will be done regularly, and that money will be provided at the office of the contractors in *London* for the payment of those bonds. It appears to me, therefore, that since, through the default of *Montero Brothers*, no money has been found for the contractors, the principal has never become payable according to the terms of the deed, and that they are bound to go on paying the interest.

But I will go still further. However the bond had been expressed, if the bond had said that the interest was to cease on a particular day, I should say that this being a mortgage bond interest would be payable upon it—in the shape of damages it may be technically, but as much interest as if it were recovered in any other shape. This seems to me to be clearly established by *Price* v. *Great Western Railway Company* (1) and *Morgan* v. *Jones* (2), where the Judges laid down the principle. They say that in the case of a mercantile security it is to be supposed that the parties intended interest to run on at the old rate if the money was not paid at the day. So they say with regard to a mortgage. Having regard to what is the principle in Equity with regard to the redemption of mortgages, although the day for payment has passed and there is no provision with the creditor for payment of interest after that day, the Court will assume that interest is payable after the day at the same rate as before. As I said before, what has to be paid may technically be called damages, but they are damages of a peculiar kind, for it would not be left to a jury to regulate their amount; the jury would be directed as a matter of law to find damages of the same amount as the interest which would have been payable if the covenant had extended over the period.

We have next to consider what is the proper construction of the 15th clause of the deed. The first part of the deed assumes that everything will be done which the *Monteros* had stipulated should be done; the second part provides what is to be done in the event which has happened of the *Monteros* not complying with their engagement to have the proper amount of money in the contractors' hands. I quite agree that we cannot construe the 15th clause without having some regard to the 2nd clause; and the 2nd clause, when examined, appears to me entirely to justify the

(1) 16 M. & W. 244. (2) 8 Ex. 620.

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conclusions at which the Lord Justice has arrived. It will be recollected that *Montero Brothers* were to provide in cash for the first payment of interest, which was in June, 1873. None of the drawn bonds were to be paid until the month of December in that year. It was necessary, therefore, to provide, as was done in the 2nd clause, for the interest that would become payable on the 1st of June, 1873, at a time when no drawing would have taken place. The first part of the 2nd section, therefore, provides that the sum to be remitted shall be applied in payment, on the 1st of June, 1873, of the half-yearly interest to become payable on the 1st of June, 1873. That, of course, includes interest upon all the bonds, for at that time there would be no drawn bonds. Then, when we come to the next half-year, it was necessary to make provision for payment of the bonds to be drawn on the 1st of November and due on the 1st of December. Now the provision, which is curious, is that the money shall be applied in payment "of the principal sums" (not of the principal sums and interest) "secured by such of the said mortgage bonds as shall have been drawn for redemption on the preceding 1st of November, upon presentation and against delivery of the bonds so drawn." No provision is there made for the payment of interest upon the drawn bonds, but only for payment of the principal. Then it goes on thus: "And of the half-yearly interest on such of the said mortgage bonds as shall be outstanding and bearing interest which will become payable on such 1st of December." Therefore I read those words, "on such of the said mortgage bonds as shall be outstanding and bearing interest" as necessarily including both drawn and undrawn bonds upon that occasion, because otherwise interest on a bond drawn in November would not be payable after the preceding 1st of June. Now, bonds drawn in November were clearly entitled to interest up to the 1st of December; but the way in which it is worded is, that the principal is to be paid, and the holders of drawn bonds are thrown together with the other bondholders for the payment of interest. I cannot agree, therefore, that in that clause the bondholders are divided into two classes, drawn and undrawn. It appears to me that the first direction for payment of interest applies to all the bonds, the second direction for payment of interest applies to the

bonds then outstanding and bearing interest. It appears to me that the terms "outstanding and bearing interest" apply to the whole of the unpaid bonds, whether drawn or undrawn. Then come the negative words, which are very sensible and very proper, because, as the Lord Justice pointed out, there may have been bonds drawn upon some former occasion, payment of which the parties had not thought proper to demand. The interest was at a high rate, and it was very natural, therefore, that as to those particular bonds, no interest should be payable after the day fixed for redemption, as they would be outstanding through the default of the holder.

Putting that construction upon "outstanding and bearing interest," we will now look at the 15th clause. I agree with what has been said, that "the bonds outstanding and bearing interest" must mean exactly the same class of bonds both in the 2nd and the 15th clauses. Now, under the 15th clause, what are the trustees to do? After payment of costs, they are to apply "the residue of the said moneys in or towards payment of the principal moneys and interest secured by the said mortgage bonds." Of course "the said mortgage bonds" there include the whole. It would include, as it appears to me, not only bonds that had been drawn and not paid by default of the *Monteros*, but it would refer to all the bonds that had ever been drawn, but with this stipulation, that by the express contract between the parties, if there were any bonds outstanding, not through the neglect of the *Monteros* in providing the money, but outstanding through the neglect of the bondholders to demand payment, the holders of those bonds would by the express negative words of that 2nd section be excluded from having any interest which had become in arrear by their own fault. Then, having determined that the money should be applied in payment of the principal moneys and interest secured by the mortgage bonds, it is to be applied "in the following order." Now, what is the order? "first in payment of all arrears of interest actually due on such bonds as shall be outstanding and bearing interest." If I am right, these drawn bonds that were not paid in consequence of the neglect of the *Monteros* are outstanding, and they are bearing interest. Why? Because the negative words in the 2nd clause are not repeated, and the negative words of the

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2nd clause must be taken, as it appears to me, with reference to a state of circumstances in which the *Monteros* had complied with the stipulation in the deed. Therefore it appears to me that the parties who held bonds that had been previously drawn but not paid through the default of the *Monteros* in finding the funds, are entitled to be paid their arrears *pro ratâ* with the said arrears. Then what is to be done secondly? "Secondly, in redemption of such an amount of the said mortgage bonds." I perfectly agree with what Mr. *Everitt* put in a very clear manner, that "in paying the bonds" or "in redemption of those bonds" must mean this, they must be redeemed in the ordinary way in which the word "redemption" is used by Courts of Equity, that is, in payment of the principal, interest, and costs, if any; and therefore, if they choose or wish to redeem the bonds at any intermediate day, and not one of the usual days for the payment of interest, undoubtedly they would have in that case to pay interest *pro ratâ* up to the day. It appears to me, therefore, that that ought to be our decision, and I am glad to find that upon the true construction of the deed we are able to arrive at what is manifestly just and equitable betwen the parties.

Solicitors, *Clarkes, Rawlins, & Clarke; Norton, Rose, & Co.; G. M. Clements.*

J. A. 1876 — V.-C. M. *Nov.* 4, 11. — 1877 C. A. *Feb.* 7, 8.

In re BRITISH PROVIDENT LIFE AND GUARANTEE ASSOCIATION.

DE RUVIGNE'S CASE.

Company—Winding-up—Director's Qualification—Paid-up Shares—Registration of Contract—Misfeasance by Director—Estimate of Damages—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 165—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

The articles of association of a company did not require that a director should be qualified by holding any shares, but the directors passed a resolution (which was not in any way confirmed by the shareholders) that the qualification should in future be 250 shares of £1 each :—

Held, that this resolution could not alter the constitution of the company, and that a person who was afterwards elected a director, and who acted in

that capacity, did not thereby enter into any implied contract to take or hold shares.

The directors of a company, in its name, entered into an agreement with *H.* that the capital of the company should be increased, and that he should endeavour to obtain subscribers for the new shares to be issued. He was to receive, by way of remuneration, a large commission on the nominal value of the new shares taken up, and also a number of shares issued as fully paid up to him or his nominees, of which 1000 were to be issued as soon as the directors had accepted four persons to be nominated by him as directors or trustees of the company. This agreement was registered. The company afterwards passed a special resolution to increase the capital to the extent mentioned in the agreement. *R.*, on the nomination of *H.*, agreed to become a director, on the understanding that he was to be qualified by holding 200 fully paid-up shares, which were to be found for him by *H.* *R.* was afterwards elected a director, and acted as such. After his election a second agreement was entered into between the company and *H.*, by which it was arranged that 2000 specified shares should be allotted to him or his nominees, as part of the consideration to which he was entitled under the first agreement. The second agreement was also registered. After this 200 of the specified shares were, at the request of *H.*, allotted to *R.*, and were with his assent registered in his name as fully paid up. Nothing was, in fact, paid for them. The company was afterwards ordered to be wound up:—

Held, that the arrangement with *H.* was fraudulent, and *ultrà vires*, but that, as *R.* had never agreed to take any but paid-up shares, he could not be placed on the list of contributories in respect of the 200 shares:

But, *held*, that *R.* had been guilty of a misfeasance in relation to the company, and that the Court could, under sect. 165, order him to pay to the liquidator the value of the 200 shares which he had obtained:

And, *held*, that there being evidence that shares had been about the same time allotted to *bonâ fide* applicants on the terms of their paying the full nominal value of them in cash, the real value of the shares must, as against *R.*, who was a wrongdoer, be taken to be the nominal value, and that he must pay the sum of £200 to the liquidator.

Statement.

THIS was an appeal from a decision of Vice-Chancellor *Malins*.

The *British Provident Life and Guarantee Association, Limited*, was formed on the 8th of July, 1870, by registration under the Companies Acts, with a capital of £20,000, in shares of £1 each. The articles of association contained (*inter alia*) the following clauses:—

"2. The regulations for the management of the association, and for the observance of the members thereof and their representatives, shall be such as the directors shall, from time to time, recommend to a general meeting, and the association, in general

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meeting shall, from time to time, upon such recommendation, but not otherwise, determine to adopt, either by way of alteration of, or in addition to, any regulations for the time being in force; and, in the meantime, and subject to any regulations to be so recommended and adopted, and without prejudice to the exercise of any statutory power of the association in reference to the alteration of its regulations by special resolution or otherwise, the regulations for the management of the association, and for the observance of its members, shall be such as are contained in these articles, and, in any event not provided for by these articles, those contained in Table A of the *Companies Act*, 1862, shall be applicable."

"5. The association may from time to time, on the recommendation of the directors, confirmed and sanctioned by a general meeting, but not otherwise, increase, reduce, or subdivide its capital or shares, or make any other alteration or arrangement in respect of the said capital or shares which may at such time or times, and in such manner as may at such time or times be authorized or permissible by any statute then in force, and the directors shall be empowered to use any such means as shall be so authorized or permissible, and as shall, in their judgment, be necessary or expedient for the effectual carrying out of any such increase, reduction, subdivision, alteration, or arrangement, recommended, confirmed, and sanctioned as aforesaid.

"6. Except when assembled at a general meeting, and as composing such general meeting, and by resolutions to be duly passed thereat, and except as empowered by statute, or by the association's regulations, the members, individually or collectively, shall have no power of controlling the directors, or interfering with the officers, business, property, or concerns of the association in any manner whatever."

These were the only provisions as to the powers of directors, and neither the memorandum nor the articles of association required that a director should be qualified by holding any shares in the association.

In February, 1872, a special resolution was passed to raise the capital of the association to £100,000, in 100,000 shares of £1 each, and this resolution was duly confirmed. It appeared by the minutes of the directors' meetings that, at a board meeting on the

Statement.

23rd of September, 1873, it was proposed and seconded "that the future qualification of directors be 250 shares, fully paid up, to take effect, so far as present directors are concerned, from the next annual meeting;" but there was no entry of any formal resolution to that effect having been passed, and no resolution was ever passed by the shareholders to adopt this rule or alter the articles of association accordingly.

On the 27th of January, 1874, an agreement under seal was entered into between the association of the one part, and *Thomas Hunt* (described as the authorized agent of *J. C. Hester* and *H. M. Carter*) of the other part. It contained a recital that it was proposed to increase the capital of the company, and to make a further issue of shares therein, in manner thereinafter appearing, and that *Hunt* had agreed to use his best endeavours to get the shares taken up, and for that purpose to expend such sums of money as thereinafter mentioned, and that it had been agreed between him and the company that, in return for his services and expenses in that behalf, he should receive from the company such commission and remuneration as therein appearing. And it was witnessed that in pursuance of the agreement the company thereby contracted with *Hunt* (*inter alia*) as follows:—

1. "The nominal capital of the company shall forthwith be raised to £1,000,000, subdivided into shares of £1 each, and the company shall forthwith take all steps requisite for carrying that purpose into effect."

2. "An issue of 100,000 shares shall forthwith be made" upon the terms of payment by the instalments therein mentioned.

3. "Provided always that the company reserve to their directors the option of refusing to allot any shares or share in any case upon reasonable cause, but in case of any and every such refusal the directors will, if and when called upon so to do by the said *Thomas Hunt*, fully state, in writing, to him the grounds of such refusal; provided always that the directors shall not have liberty to exercise such right of refusal on the ground that they have enough capital."

4. "The company will pay to the said *Thomas Hunt* a commission upon all shares forming part of the issue aforesaid, and hereinafter allotted to any person or persons whomsoever (excepting

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only upon shares allotted to the said *Thomas Hunt* or his nominees as fully paid-up shares, under the provisions hereinafter contained)."

5. "Such commission shall be after the rates following (that is to say): the sum of 2*s.* 6*d.* per share on payment of allotment money; the further sum of 1*s.* per share on payment of the first call thereon; and the further sum of 6*d.* per share on payment of the second call thereon."

6. "By way of further remuneration, there shall be allotted to the said *Thomas Hunt* or his nominees, in the manner and at the times in that behalf hereinafter mentioned, such fully paid-up shares in the company as hereinafter mentioned (that is to say)

"(1.) 1000 fully paid-up shares shall be so allotted as soon as the directors shall have accepted four gentlemen, to be nominated by the said *Thomas Hunt*, to act as trustees or directors of the said company, the company hereby agreeing that their directors shall accept or refuse such nominees for the office aforesaid within three days after their names shall have been submitted in writing to the directors for that purpose by the said *Thomas Hunt*, and the directors shall not refuse any such nominee as last aforesaid without reasonable cause, and in case of any and every such refusal, shall fully state in writing to the said *Thomas Hunt* the grounds of such refusal.

"(2.) A further number of 2000 fully paid-up shares, as soon as the full number of 30,000 shares (including therein the 1000 fully paid-up shares hereinbefore agreed to be allotted to the said *Thomas Hunt* or his nominees) shall have been allotted.

"(3.) A further number of 2000 fully paid-up shares as soon as the full number of 50,000 shares (including therein the 3000 fully paid-up shares hereinbefore agreed to be allotted to the said *Thomas Hunt* or his nominees) shall have been allotted.

7. "The said *Thomas Hunt* shall be entitled to nominate such person or firm as he shall think fit to be the first solicitor or solicitors to the said company, and the company will appoint such person or persons to be their solicitor or solicitors accordingly."

8. *Hunt* covenanted with the company that he would, at the times thereinafter in that behalf mentioned, expend "in such manner as the said *Thomas Hunt* shall in his absolute and uncon-

trolled discretion think fit for the benefit and advantage of the company, and for getting the shares therein taken up and subscribed for, or otherwise, the several sums hereinafter mentioned (that is to say)

"(1.) When the said 1000 fully paid-up shares shall have been duly allotted to him or his nominees under the provisions in that behalf hereinbefore contained, the sum of £500.

"(2.) When and as soon as 10,000 shares shall have been subscribed for, the additional sum of £500.

"(3.) When and as soon as 25,000 shares shall have been subscribed for, the additional sum of £500."

9. "Provided always that these presents shall remain in force only for the period of one year from the date thereof, and at the expiration of that period the provisions hereof shall expire and cease to operate, except so far as may be necessary for obtaining the payment or allotment of any money or shares which under the provisions aforesaid shall have become due or payable, or ought to have been allotted during the said period, or otherwise for carrying into effect the operation which any of the said provisions may have had during the said period."

This contract was approved at a meeting of the board of directors on the 27th of January, 1874, and it was afterwards registered with the Registrar of Joint Stock Companies. In April, 1874, a special resolution was passed authorizing the increase of the capital to £1,000,000. On the 21st of April, 1874, the board of directors resolved to allot 2000 shares to *Hunt*, but this resolution was rescinded on the 23rd of June, "there having been no application received and no entry made in the register of members of the association." On the 16th of June seven gentlemen were elected members of the board of directors. One of these was Colonel *De Ruvigne*. He had been induced by *Hunt* to join the company, and was nominated by him as a director. *Carter* was another of the directors then elected. Colonel *De Ruvigne* was informed by *Hunt* that his qualification would be found for him by means of fully paid-up shares to which *Hunt* was entitled under an agreement between him and the company in payment of certain expenses, and he was told by the manager that 200 shares formed the required qualification. He accepted the office of director, and attended four

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meetings of the board, viz., on the 30th of June, the 23rd of July, the 11th of August, and the 25th of August, 1874.

On the 4th of August, 1874, a contract was entered into between the company and *Hunt*, by which (after a recital of the contract of the 27th of January, 1874) it was agreed between the company and *Hunt* that the company should issue as fully paid-up shares to *Hunt* or his nominees (the names of the nominees to be delivered to the directors in writing), and *Hunt*, for and on behalf of himself or his nominees, did thereby accept the shares in the company, Nos. 3510 to 5509 inclusive, as fully paid-up shares, without payment of any part of the amount thereof in cash, as part of the commission to which he was entitled in pursuance of the agreement of the 27th of January. And the company thereby declared that the said shares should accordingly be issued to *Hunt* or his nominees, the names of whom should be handed to the directors in writing. This contract was approved at a meeting of the board of directors on the 4th of August, 1874, and it was afterwards registered. At a meeting of the board of directors on the 11th of August, 1874, at which Colonel *De Ruvigne* was present, a letter from *Hunt* was read, in which he requested that, under the contract of the 4th of August, 200 shares might be allotted to each of eight gentlemen whom he named. Colonel *De Ruvigne* was one of them. The board then resolved to allot 200 shares, of which the numbers were specified, to each of those eight gentlemen, and 200 shares, Nos. 4710 to 4909, were allotted to Colonel *De Ruvigne*, and his name was afterwards entered on the register in respect of them, it being there stated that calls to the amount of £200 had been made on the shares, and that £200 had been paid. No money was, in fact, ever paid for the shares. A letter of allotment was sent to him by the manager of the company on the 11th of August. He was never entered on the register as the holder of any other shares. In November, 1874, being dissatisfied with the management of the company, he sent in a resignation of his office of director, and at the same time returned the letter of allotment. But his name continued on the register in respect of the 200 shares, when in February, 1876, an order was made to wind up the company. Only 5800 shares had been allotted in the company, including the 1600 allotted as fully paid up. More than 1200 shares were allotted

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between June and December, 1874, to *bonâ fide* applicants, on the terms of their paying for them the full nominal amount in cash. The official liquidator applied to have Colonel *De Ruvigne* placed on the list of contributories in respect of 250 shares as the qualification of a director, and also in respect of the 200 shares which stood in his name as shares in respect of which nothing had been paid. The liquidator also took out a summons asking in the alternative (under sect. 165 of the *Companies Act*, 1862) that Colonel *De Ruvigne* might be ordered to pay to him £200, the full nominal value of the 200 shares, with interest thereon at 5 per cent. per annum from the date of the allotment. The hearing of these summonses was adjourned into Court, and they came on to be heard before Vice-Chancellor *Malins* on the 11th of November, 1876.

Statement.

Higgins, Q.C., and *Grosvenor Woods*, for the official liquidator:—

Argument.

We seek to place Colonel *De Ruvigne* on the list of contributories in respect of 450 shares, that is, 250 as the qualification he was bound to hold as director, and 200 shares which were improperly allotted to *Hunt* as fully paid-up shares and transferred to Colonel *De Ruvigne*. First, as to the 250 shares: *De Ruvigne* was appointed a director at a board meeting on the 16th of June, 1874, and attended several subsequent meetings of the board as a director. He was, therefore, bound to have a qualification as director, *Harward's Case* (1), and was liable in the winding-up for the qualification number of shares: *Stephenson's Case* (2). Before he was so appointed a resolution had been passed that the qualification of a director should be 250 shares. He alleges that he was told by the secretary that 200 shares was the qualification, but it was his duty to have ascertained the fact.

As to the 200 shares transferred to *Ruvigne* by *Hunt:* they were allotted to *Hunt* under an illegal contract. The consideration for that contract was to give *Hunt* 2000 fully paid-up shares for obtaining shareholders, in other words, for placing a certain number of shares of the company which in fact never were placed. That contract was not within the powers of the directors,

(1) Law Rep. 13 Eq. 30. (2) 45 L. J. (Ch.) 488.

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Argument.

and was illegal: *James* v. *Eve* (1); *Stace and Worth's Case* (2). The contract was signed in August, 1874, during the time that *De Ruvigne* was a director of the company. He must, therefore, be placed on the list in respect of those 200 shares as unpaid shares, since the company had no right to issue them as paid-up shares: *Crickmer's Case* (3).

At the time the contract was signed by *De Ruvigne* he was not qualified to act as a director, for he had not then taken any shares, therefore, according to the case of *In re Disderi & Co.* (4), he had no power to sign the contract; but if he had qualified himself within a reasonable time it would have been sufficient. A reasonable time would have been before the second meeting, but the transfer of shares to him was not executed till August, 1874.

Glasse, Q.C., and *Kekewich*, for *De Ruvigne*:—

No resolution was ever passed by the company that the qualification of a director should be 250 shares, although a proposal to that effect was made at a board meeting. There was an agreement between *Hunt*, who was a promoter of the company, and the company, that he should have 2000 fully paid-up shares in consideration of certain expenses which he was to pay and has paid. That agreement was registered under the 25th section of the Act of 1867 (30 & 31 Vict. c. 131), and these shares must therefore be treated as properly paid-up shares which were granted for a consideration: *Carling's Case* (5).

Of these shares 200 were transferred to *De Ruvigne*, and he was therefore a legal holder of 200 shares fully paid up. These were sufficient for his qualification, which was originally fixed at 200 shares. It is proved that the secretary told him that was the qualification, and no formal resolution having ever been passed by the directors or confirmed by a general meeting to increase the qualification, he was not bound to hold more than that number. It was held in *Brown's Case* (6) that it was not necessary for a director to take his qualification shares directly from the company, but might take a transfer of fully paid-up shares from the promoter.

(1) Law Rep. 6 H. L. 335.
(2) Ibid. 4 Ch. 682.
(3) Ibid. 10 Ch. 614.
(4) Law Rep. 11 Eq. 242.
(5) 1 Ch. D. 115.
(6) Law Rep. 9 Ch. 102.

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Argument.

Higgins, in reply:—

The resolution as to the 250 shares was in the usual terms. It was passed on the 23rd of September, 1873, and on the 30th of September the minutes of the previous meeting were read and confirmed. Mr. *De Ruvigne* was appointed director under similar terms. There was no more formal resolution for his appointment than for the qualification of a director. Under the 55th clause of Table A the directors could do all that the company could do. The only real question is whetner he is to be fixed with 250 shares or 450 shares. They say he has taken 200 fully paid-up shares, but we say that was not in pursuance of the clause requiring qualification.

Carling's Case (1) is distinguishable from this, because there there was a contract for sale of certain property to the company, to be paid for by shares fully paid up, which was a valid contract, but this contract was invalid from the beginning.

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MALINS, V.C.:—

The present application by the official liquidator of this company is that Colonel *De Ruvigne* should be put on the list of contributories for 250 shares, which he was bound to take as his qualification as director. He was elected a director on the 16th of June, 1874, and thereupon, it is said, he was bound to take 250 shares. There is also an application to put his name on the list in respect of 200 other shares which he acquired from a Mr. *Hunt*, they being allotted to him as a nominee of *Hunt*, making altogether 450 shares.

Now, in order to arrive at a conclusion, I must look at the circumstances under which he became a director. The case is one of those which it is impossible for any Court to hear argued without the greatest possible regret that gentlemen can be found who think themselves justified in taking the course which Colonel *De Ruvigne* has taken. That he joined this society with the expectation and in the belief that a qualification was necessary, is beyond all doubt, because his own statement is that the manager told him that 200 shares were the qualification of a director. But it turns

(1) 1 Ch. D. 115.

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out that by the constitution of the company when he joined, the qualification was to be 250 shares. That is the effect of a minute (not a resolution) of the board of directors on the 23rd of September, 1873. Now, I cannot hear a gentleman of education and position in life, who joins a company like this, say that it was not his duty to look at its constitution before he joined it. Before he permitted his name to be used to attract new subscribers and policy-holders to the society, it was surely his duty to ascertain his position, and above all, to inquire what the constitution of the company was, and I cannot permit him, therefore, to say that he is only liable for a particular number of shares, because the secretary told him that was the number qualifying a director, when he had only to turn over the minutes of the board to see that a greater number was required as the qualification. If, therefore, what took place on the 23rd of September, 1873, is binding, 250 shares, and not 200, is the qualification of a director.

But it is said that what took place on the 23rd of September is not a resolution, and is not binding, that it is merely a proposal seconded but not acted upon. The minutes of the proceedings of the board are, no doubt, entered in a very inartificial way. But, considering that those are the minutes of the meeting of the 23rd of September, and that they were read and confirmed at the succeeding meeting, there can be no doubt whatever that, although in words the fact of the proposed resolution having been put to the meeting and passed is not recorded, any one acquainted with the constitution of the company must have known very well that the resolution had been passed, and was adopted, and that it was of the same effect as if it had been formally passed as a resolution. It was the duty of the directors to see that all proceedings were properly recorded, and although this was a long time before Colonel *De Ruvigne* joined the company, yet, if he, as a director, found anything of the kind, it was his duty to see it set right in order that there might be no mistake about it. I quite agree, too, with what Mr. *Higgins* said, that there is another circumstance which is conclusive against Colonel *De Ruvigne*, viz., that when he was appointed a director the minutes of the board simply state that it was proposed by one person and seconded by another that he should be elected a director, and no formal resolution is recorded

as having been passed. If, therefore, he admits that he was a director, he was only so by virtue of a proceeding precisely the same as that which provided that the qualification should be 250 shares. Therefore I am of opinion that he came into this company with the knowledge, and that he was bound to know, that the qualification of a director was 250 shares, and 250 shares, therefore, by the settled decisions of the Court, he was bound to take by reason of his sitting at the board. The mere sitting at the board was sufficient, as I held in *Harward's Case* (1), to impose that obligation on him. I there followed the decision of the Court of Appeal in *Leeke's Case* (2), that the sitting and acting as a director implies a contract to take the number of shares which is the minimum qualification for a director. I am of opinion, therefore, that when Colonel *De Ruvigne* first sat at this board he became liable to take 250 shares, and with those 250 shares he must now be fixed on the list of contributories.

Then it is said he was not bound to take the shares immediately. Mr. *Higgins* argued that although it is said in the *Marquis of Abercorn's Case* (3) and other cases that a director is not bound to take his qualification shares immediately, yet he must do so within a reasonable time. I am of opinion in the present case that reasonable time would not extend beyond the month of July following the election of Colonel *De Ruvigne*. He had no right to sit at the board without having at the very time a qualification. If he sat once, I am clearly of opinion that he should not have sat a second time. Every principle requires that a man managing the affairs of others should have a substantial stake in that which he is managing. It may be that a man having a qualification may so misconduct and mismanage affairs of a company as to lose his own capital and the capital of all the other shareholders; but the possession of shares in the company is a great security to those who commit the management to the directors, that they will be careful how they manage their affairs, because they place their own money in peril if they misconduct them. Therefore I am of opinion that a director who is bound to take a qualification, if for any reason he cannot obtain it the first day he takes his seat at the board, should never think of sitting a second time at the board without

(1) Law Rep. 13 Eq. 30. (2) Law Rep. 6 Ch. 469.
(3) 4 D. F. & J. 78.

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the qualification. For these reasons, therefore, I put Colonel *De Ruvigne* on the list for 250 shares.

Then it is said that he acquired 200 shares, at all events, in August by the transaction with *Hunt*. I am bound to say that, if it were necessary for me to decide the point, I should come to the conclusion that the transaction with *Hunt* was a foolish and ridiculous, if not a fraudulent, one, discreditable to *Hunt*, discreditable to the directors, and discreditable to everybody concerned in it. If necessary, I should come to the conclusion that the 200 shares cannot be regarded as fully paid-up shares, and certainly for this purpose I cannot take them into consideration. At the same time my impression is that Colonel *De Ruvigne* intended them to be the shares taken for his qualification, and I can only express my regret that he should have thought himself justified in availing himself of such a transaction with *Hunt* for the purpose of obtaining his qualification. My opinion is that the transaction with *Hunt*, if it were necessary to decide the point, was a mere nullity—that it did not give to *Hunt*, and therefore could not give to his nominee, any paid-up shares whatever; but I leave the matter open. It may be necessary in other cases which may hereafter arise in this company to decide the point. But what I decide now is that Colonel *De Ruvigne* by acting as a director of this company became liable to take the minimum qualification which by the constitution of the company was required for a director, and I cannot permit him to avail himself of such technicalities as have been urged on his behalf to escape from the contract which he entered into, by acting as a director, to hold a qualification of at least 250 shares.

I am of opinion, therefore, that he must be placed on the list of contributories for that number of shares, and that number only, and he must pay the costs, in Chambers and here, of the summons which involves that question.

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From this decision Colonel *De Ruvigne* appealed. The appeal was heard on the 7th and 8th of February, 1877.

Argument.

Kekewich (*Glasse*, Q.C., with him), for the Appellant:—

There was not even a valid resolution of the board of directors imposing any qualification upon a director; and if there was, it could not alter the constitution of the company as contained in

the memorandum and articles of association. That could not be altered except by a special resolution of the company. And the authorities shew that the mere fact of acting as a director does not necessarily raise the implication of a contract to take or hold the number of shares prescribed as the qualification of a director: *Leeke's Case* (1); *Brown's Case* (2). And as to the 200 shares which were registered in the Appellant's name, he never agreed to take them except as fully paid-up shares. They were issued as fully paid up under a duly registered agreement, and the Appellant cannot now be compelled to pay anything for them: *Carling's Case* (3).

The agreement with *Hunt* having been registered, sect. 25 of the *Companies Act*, 1867, prevents its validity being impeached so far as the issue of the shares as fully paid up is concerned. No one who looked at the register could be deceived, for the second agreement specifies the numbers of the shares issued to *Hunt*, and the Appellant's name appeared on the register as the holder of some of these shares. The mischief aimed at by sect. 25 did not, therefore, exist.

Then as to sect. 165, the agreement with *Hunt* was at the most *ultrà vires;* there was nothing fraudulent in it. If it was only *ultrà vires* it effected nothing. Under sect. 165 directors can only be made liable for what they actually did, not for what they may have intended to do. Moreover, the agreement of January was complete before the Appellant became a director; the agreement of August did nothing more than designate the particular numbers of the shares to which the Appellant was entitled under the agreement of January. Even if the Appellant is liable to pay damages under sect. 165, it does not follow that he should pay the nominal value of the shares. The judgment of *Brett*, J., in *Carling's Case* (4) shews that he cannot be charged with more than the real value, and that may be nothing at all. The shares of this company are practically worthless.

Higgins, Q.C., and *Grosvenor Woods*, for the official liquidator:—

The directors, under the powers given to them by the articles of

(1) Law Rep. 6 Ch. 469.
(2) Ibid. 9 Ch. 102.
(3) 1 Ch. D. 115.
(4) Ibid. 130.

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Argument.

association and the regulations of Table A, had authority to impose the qualification on future directors, and the Appellant, who was elected after the resolution of the 23rd of September, 1873, and acted as director, was bound to hold 250 shares as his qualification. *Brown's Case* (1) only shews that it was not necessary he should get them directly from the company. That case was considered by the Master of the Rolls and its meaning explained in *Miller's Case* (2), and the judgment of the Master of the Rolls shews that a person who acts as a director thereby enters into an implied agreement with the company to acquire the necessary qualifying number of shares, but that he has a reasonable time within which to obtain the qualification, and if he is placed on the register for that number of shares, even without his knowledge, he is estopped from saying that he is not properly placed there. All the cases shew that there is such an implied agreement: *In re Disderi & Co.* (3); *Fowler's Case* (4); *Leeke's Case* (5). And *Brown's Case* does not really conflict with them. At any rate the Appellant was placed with his own assent on the register for 200 shares, and he must shew that they were in fact fully paid up. It is not enough to shew that the contract under which they were issued was registered, for it was in itself *ultrà vires* and void, and registration will not make it good: *Crickmer's Case* (6). The whole bargain with *Hunt* was fraudulent and void: *Stace and Worth's Case* (7); *James* v. *Eve* (8); *Barnett's Case* (9). The 200 shares ought, therefore, to be treated as unpaid. But, even if this cannot be done, still the directors, in making the agreement with *Hunt*, were guilty of a misfeasance or breach of trust towards the company, to which the Appellant made himself a party, and under which he obtained 200 shares, part of the property of the company. Under sect. 165 the Court has power to order him now to pay the value of these shares. And as against him, a wrongdoer, the actual value must be taken to have been the nominal value, *i.e.*, £200: *McKay's Case* (10).

(1) Law Rep. 9 Ch. 102.
(2) 3 Ch. D. 661.
(3) Law Rep. 11 Eq. 242.
(4) Ibid. 14 Eq. 316.
(5) Ibid. 6 Ch. 469.
(6) Law Rep. 10 Ch. 614.
(7) Ibid. 4 Ch. 682.
(8) Ibid. 6 H. L. 335.
(9) Ibid. 18 Eq. 507.
(10) 2 Ch. D. 1.

Kekewich, in reply, as to the 200 shares only.

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JAMES, L.J.:—

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Although we are not prepared to affirm the judgment of the Vice-Chancellor upon the ground on which he based it, yet we think that (with the exception I am about to state) in substance his decision ought to stand. We are unable to see, having regard to all the facts which have been brought out before us, any foundation for holding that there was an implied agreement (it is admitted there was no express agreement) by the Appellant to take 250 shares as a qualification for the office of director, because in fact the very basis of such an implied agreement—the basis upon which the cases have proceeded, that is to say, that there was by the constitution of the company a qualification affixed to the office of director—has, in our judgment, failed, there being nothing in the memorandum or articles of association of the company on the subject. The only thing is a mere entry—a very informal entry—amongst the minutes of the directors, at which, beyond all question, any one joining the company was not obliged to look, and could not be supposed to have looked, and which, if any one had looked at it, unless he had done so with the eye of a lawyer, would not have informed him that there was really any qualification affixed to the office of director. Therefore, to that extent, I am unable to agree with the judgment of the Vice-Chancellor. But the liquidator, feeling, no doubt, that there might be some difficulty in fixing Colonel *De Ruvigne* as a contributory, has taken out a summons under the 165th section, on the ground of what may be called misconduct on his part as a director, and it appears to me that he has proved beyond all question very serious, very grave, misconduct against him. It is difficult to understand how people can lend themselves to transactions of this kind. But we have here an agreement by the company, however it was then constituted or managed, with Mr. *Hunt*, which was the merest sham I ever saw, and I cannot understand how any directors could have sanctioned such an agreement, or have affixed the seal of the company to it. It is a thing utterly *ultrà vires* and void, besides being from its very nature a fraud if it was ever carried into effect. It would have been a fraud to give the sums of money,

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which it purported to give to Mr. *Hunt;* but it was also *ultrà vires* by reason of its making the directors mere nominees of *Hunt,* and for many other reasons. Well, that agreement was void. But before it was further acted upon the Appellant allows himself to become the paid agent of *Hunt* for the purpose of assisting him in his transactions with the company; for that is what it comes to. *Hunt,* having made this bargain by which he was to get some paid-up shares from the company, says to this gentleman, I will name you and qualify you as a director; you shall be on the board as my nominee. I will give you your qualification, and the first thing you have to do is to carry out that agreement with me. That is really what it comes to, and this gentleman accepted the office of director upon those terms. It is impossible to say that the thing is not as gross misconduct as any man in the position of a director could be guilty of. Well, then, as part of that scheme, as part of that dealing with the company, 200 shares are allotted to the Appellant as paid-up shares. I am of opinion that he had these 200 shares, which were intended to be valuable shares, which were part of the property of the company, given to him as part of that fraudulent arrangement, and that he must now answer for the real value of them. But what is the value of them as between him and the company? I am of opinion that as against him, at all events, the value which he ought to pay for them is that sum which he, as an honest director, would have got at the time from an honest purchaser applying for the same number of shares to the company. We shall be doing no injustice, and inflicting no hardship upon him, if we say that he must pay the full price which he would, on the assumption of honesty, have then exacted from a person so dealing with him as a director.

I am of opinion that, having regard to all the circumstances, he ought to be fixed with £200 as the value of these 200 shares. And, as the order of the Vice-Chancellor is altered to that small extent only, I do not think this ought to make any difference as to the costs of the appeal, which I think the Appellant must pay.

Brett, J.A.

BRETT, J.A.:—

I conceive it to be our duty, whether we agree with the Vice-

Chancellor or not, to give our reasons and to state the principles of law upon which we act. Now I think, after the arguments we have heard, that it is impossible properly to hold that this gentleman can be placed upon the list of contributories, for there is no evidence upon which the Court could legally and properly hold that he ever agreed either to take or to hold shares upon the terms of paying for them. The strongest point made in favour of the proposition that he might be placed on the list is, that he fraudulently represented himself, or allowed himself to be represented on the register, as the holder of 200 shares, while at the same time he had made a fraudulent arrangement that he would not pay for them. But I think Mr. *Kekewich* pointed out the real difficulty of that contention, viz., that if the company attempt to make the Appellant a contributory, and they allege fraud in the original agreement by which he was to take the shares, they must either throw over the agreement altogether, or they must take it altogether; they cannot adopt it as to one part and reject it as to the rest. If, therefore, they, notwithstanding the fraud, resolved to adopt the transaction, they would have to adopt it as a whole, and then the result would be that he took the shares upon the terms that he was not to pay for them.

Then it was contended that it was part of the constitution of the company that a director should have a certain qualification, and that this gentleman acted as a director, and upon that it was said that the Court is bound to imply that he thereby agreed to take or to hold the qualification, and that, if he did not obtain the qualification from some one else within a reasonable time, it is to be implied that he was to take the shares constituting the qualification from the company, and to pay the company for them. Now, I do not think it necessary (although I confess I have an opinion about it) to determine that question, because the foundation of it fails. It was not a part of the constitution of this company that the directors should have a qualification. There was a resolution of the directors that the qualification of future directors should be the holding of 250 shares, but it seems to me that is a matter which the directors had no authority to impose upon the company, or upon any one else. Therefore, the foundation of that part of the case failing, it is useless to discuss what the result of the suggested

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evidence would be if it existed. I think there is no evidence upon which we can properly find that this gentleman ever agreed, that is, ever had an intention in his own mind which he expressed to any one, to take or hold shares upon the terms that he should pay for them, and unless such an agreement can be made out by evidence, I think no person can be put on the list of contributories of a company.

But then comes the question whether the Appellant is not liable under sect. 165 of the Act of 1862, and if so, to what amount he is liable. I think that the only way in which he can be made liable under that section is, if we can say that he has been guilty of a misfeasance, that is to say, of some act which amounts to misconduct in relation to the company. Now, I take the reality of the transaction—not its appearance, but its reality—to be this, that *Carter* was, as it has been suggested, the real getter up of the company and the person who undertook to enlarge it, using as his instrument *Hunt*. *Carter* being a director of the company, and *Hunt* being apparently not concerned with it, except by virtue of a sham agreement, *Hunt* or *Carter*, or *Hunt* and *Carter*, persuaded this gentleman, amongst others, to appear as if he were a director, or were about to become a director of the company, as if he were intended to direct the business of the company, but he was to be in reality the nominee of *Hunt* or *Carter*, or both. He was to pretend to be a director, and as such pretended director he was to make an agreement with *Hunt*, which could be of no benefit at all to the company, by which shares were to be given to *Hunt* for which he was really not bound to do anything, although certainly it is stated on the face of the agreement he was to use his best endeavours to do something for the company. It was agreed that the shares should be given to *Hunt*, but in order to persuade *De Ruvigne* to act as such pretended director, he was to have 200 of those shares given back to him by *Hunt*. Now, that seems to me really to make the apparent agreement amount to a sham; the only result of it is that a number of shares of the company are to be given to *Hunt* by *De Ruvigne*, who for doing that is to keep some of the shares himself. That is the result of the first agreement.

Now, the second agreement is in one sense a mode of carrying

out the first agreement, but it goes further, and the very recklessness of the second agreement is strong evidence to shew the real meaning of the first agreement, to shew that they are both sham agreements, and that the only effect of them was to give money to *Hunt* and to keep money for *De Ruvigne*, that is, to keep it in the shape of shares paid up. I cannot help thinking, without wishing to use harsh words, that that is misconduct, the grossest misconduct, on the part of a person who assumes to be a director of a company, and therefore that Colonel *De Ruvigne* is within the 165th section—that he has been guilty of a misfeasance in the shape of misconduct by which he has wrongfully taken into his own hands 200 of the shares of this company.

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I agree that under such circumstances he cannot be put on the list as a contributory, but that the Court must say what sum he is to pay towards the assets of the company. I agree that that sum is not necessarily, as a matter of law, the nominal value of the shares he has so taken, but that it must be that which the Court shall say is the proper sum for him to pay. What, then, is the proper sum for him to pay under circumstances of such misconduct? There were *bonâ fide* subscribers for shares in this company. We are not, therefore, entitled to say that the shares which *De Ruvigne* took for himself could not have been disposed of to some one else, and, if they could have been disposed of to some one else, why are we to say that they could not have been disposed of for the sum for which *De Ruvigne* took them? He took them as being of their nominal value, and it is shewn that there were other people in the world who might have taken them for their nominal value. Under these circumstances, and as against a person acting in the way in which Colonel *De Ruvigne* has done, I should say that we, sitting as a jury to assess the damages, are entitled to hold him liable for the nominal amount of the shares—that we are entitled to say, and ought to say, that their real value was the same as their nominal value. The Appellant, therefore, ought to pay £200 towards the assets of the company.

AMPHLETT, J.A.:—

Amphlett, J.A.

I am of the same opinion. If it had been part of the constitution of the company that the directors were to hold a certain

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minimum qualification, whether the fact of Colonel *De Ruvigne* having become a director, and having acted for a considerable time as a director, would or would not have given rise to, I will not say an implied contract, but a duty on his part which could have been enforced in this Court, of taking shares to the extent of that minimum qualification, I do not say. Upon that point it is not necessary to express any opinion, because there was nothing in the constitution of the company requiring a director to have a qualification. I quite agree that a mere entry in the minutes of the directors that it was their intention that there should be a qualification, is not a thing of which this gentleman was obliged to take notice, even if he knew of it at the time when he became a director. I only mention this because I would not have it understood that I at all differ from the view taken by the Vice-Chancellor of what the consequence would have been if there had been such a stipulation made, not by the directors, but by the constitution of the company.

Then we come to those facts upon which we proceed. I will not go over the ground again with regard to the two agreements, but I cannot help saying that they appear to me to be the most utter shams than can be conceived. Really, as the Vice-Chancellor said, these agreements were ridiculous, if they were not fraudulent. I must say, without wishing to use harsh words, that I think them both not only ridiculous but fraudulent, at least in the sense in which we use the word. I say in the sense in which we use the word, because I can easily understand that gentlemen who were not accustomed to business might not see the whole effect of what they were doing; they might consider the agreements merely as part of the machinery for getting paid-up shares for their qualification. Therefore I do not wish to go further than is necessary for my decision, or to say more than that these agreements were shams, and that, necessarily to any one at all acquainted with the legal aspect of the transaction, it would have been clear that they were as complete frauds as could be.

Well, then, under those circumstances, what this gentleman does is this: He avails himself of that deed which gave *Hunt* the power of appointing four directors, and of having a certain number of shares fully paid up allotted to him, evidently, as it appears to

me, for the purpose of enabling him to give a qualification to his nominees. This gentleman chose to become the nominee of *Hunt*, and to receive these shares, although, as we have held, there was no obligation upon him to take any shares as a qualification. He took these shares for the purpose of giving him the appearance at least of having a qualification as director. These shares are described as paid-up shares, they are entered in his name in the company's register, and cash is stated to have been paid for them, which is entirely untrue.

Under these circumstances, his taking the shares being a fraud upon the company, what is the remedy against him? Under the 165th section we are empowered to do that which we consider right in the matter. We have a discretion, to be exercised according to legal principles, to do what we think is right. Well, then, what ought he to be charged with for these shares? It is said by Mr. *Kekewich* that the shares are now valueless, which, I dare say, is the case, but they were not valueless at the time he took them. The company's books shew that between June and December, 1874, as many as 1248 shares were taken in the company, and there were only two shares transferred. As it was graphically expressed by one of my learned Brothers, a number of fools were found who would take the shares. It appears, therefore, to me that, as against a wrongdoer, we are quite justified in charging him with the same amount as a great number of other persons among the public thought it worth their while to give for the shares. I think we are quite justified in ordering him to pay the full nominal value of the 200 shares. I think also that under the circumstances the Appellant ought to pay the costs of the appeal.

Grosvenor Woods:—How will your Lordships deal with the question of interest?

James, L.J.:—We give the sum as damages.

Solicitors for Appellant: *Saunders, Hawksford, & Bennett.*
Solicitors for Official Liquidator: *Bellamy, Strong, & Bennett.*

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1877
M. R.
Jan. 19.
C. A.
Feb. 14.

RODERICK *v.* ASTON LOCAL BOARD.

[1876 R. 268.]

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 16—*Sewer—Power to carry Sewer over Lands.*

By the *Public Health Act*, 1875, s. 16, a local authority is empowered to carry any sewer "into, through, or under" any lands within its district, and the Act provides for compensation to all persons sustaining damage by reason of the exercise of the powers of the Act in relation to any matters as to which they are not themselves in default. A local board under this Act proceeded to carry a sewer across the Plaintiff's pleasure grounds on such a level that the bottom of the sewer would be only slightly below the surface, and a permanent embankment about six feet high would be made:—

Held (by the Master of the Rolls and by the Court of Appeal), that they were authorized so to do, for that the Act did not confine them to carrying a sewer underground.

Statement.

THE Plaintiffs were joint tenants in fee of two houses at *Aston* having pleasure grounds attached to them, one of the two houses being a public-house.

In the beginning of September, 1876, the Defendants, the *Aston* Local Board, under the powers of the *Public Health Act*, 1875 (1), served a notice upon the Plaintiffs that the board intended to carry a sewer through, across, or under the above-mentioned pleasure grounds, and would enter upon the lands for that purpose, on the 14th of September.

(1) Sect. 15: "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

Sect. 16: "Any local authority may carry any sewer through, across, or under any turnpike road, or any street or place laid out as or intended for a street, or under any cellar or vault which may be under the pavement or carriage-way of any street, and after giving reasonable notice in writing to the owner or occupier (if on the report of the surveyor it appears necessary), into, through, or under any lands whatsoever within their district."

Sect. 308: "Where any person sustains any damage by reason of the exercise of any of the powers of this Act in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers, and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act, or if the compensation claimed does not exceed the sum of £20," &c.

The sewer thus proposed to be constructed was to be a brick sewer 4ft. 6in. in diameter inside, the brickwork to be 9 inches thick, and the sewer to be partly below and partly above the surface of the ground. The Defendants' engineer deposed that part of the diameter to about an average depth of 1ft. 6in. would be below the surface. The sewer was to be covered with earth above to a depth of about 2 feet, so that the effect would be to carry an embankment of the average height of more than 5 feet above the surface through the Plaintiffs' grounds. The Plaintiffs commenced this action to restrain the execution of the works, and moved for an injunction. The motion came on for hearing before the Master of the Rolls on the 19th of January, 1877.

Statement.

Chitty, Q.C., and *Glen*, for the motion.

Davey, Q.C., and *Woodroffe, contrà.*

JESSEL, M.R. :—

Judgment, M.R.

The question being one of pure law, I am bound, as I understand the practice of the Court on motion for injunction, to give an opinion upon it. The only question that I have to decide is, whether, under the powers of the *Public Health Act*, the Defendants, the *Aston Local Board*, have a right to carry a sewer partly under and partly above ground. [His Lordship read the 16th section.] The word "lands," according to the interpretation clause includes buildings.

Now I am asked to say that the words "into, through, or under" mean simply "under." I decline to say so. Why am I asked to make three words into one? The word "under" is distinguished by the word "or" from "into" or "through." The board may not only carry a sewer under, but "into, through, or under." It is said that means that they must make the sewer by means of a tunnel, or, if by a cutting, that they must cover over the cutting so that the sewer shall always be carried under. But taking the ordinary meaning of the English language, if I am to carry anything, into, through, or under land, that does not mean that it must be wholly under. Taking this clause alone I have no doubt whatever that this sewer, being partly under and partly above the surface, is carried into, through, or under the lands in question.

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If the argument had stopped there I should have nothing more to add, but it does not stop there. It is first of all said that there is a context to shew that whatever the ordinary meaning of the words into and through lands may be, or whatever their ordinary meaning may be when contrasted with the word "under," the words "into, through, or under" in this particular Act of Parliament are intended to mean under and nothing else. Now, it is enacted that any local authority may carry sewers through, across, or under any turnpike road, or any street or place laid out or intended for a street, or under any cellar or vault. It is said, then, that if you read the word through there as authorizing the making a sewer above a turnpike road, it would enable the board to obstruct the traffic, and that it is not likely that the Legislature would have conferred any such power. I do not think that the argument from probability is sufficient, because the Legislature, when conferring powers of this kind on a public authority for the public benefit, will not impute to them the desire or the intention of using them so as to obstruct the necessary traffic on a turnpike road. It is left to the discretion of the local authority whether they will carry the sewer above the turnpike road or under it, the Legislature assuming that they will carry it in such a manner as not to interfere with the traffic. The turnpike road at that point may be below the level of the adjoining parts, so that by carrying the sewer in the turnpike road they may make the road level which before was in a valley, and so improve it for traffic. Where bodies like this have only the public benefit in view you must impute to them a reasonable mode of carrying out the objects which they are empowered to carry out, more especially as the 308th section of the Act provides for giving full compensation where any person sustains any damage by reason of the exercise of any of the powers of the Act in relation to any matter as to which he is not himself in default. I think, therefore, that they have such a power even as to a turnpike road. These bodies are divided into two classes, rural authorities and urban authorities. The urban authorities have special powers of altering the levels of the roads. By the 144th section the highways in the town are vested in the urban authorities, and by the subsequent sections, especially the 149th and 150th sections of the Act, the urban authorities have

express powers to alter the roads and to alter their levels, make them higher or lower, and do pretty well what they like with them. Therefore that they should have this power to carry the sewers so as to affect the levels of the roads, is not only not inconsistent with the Act but perfectly consistent with it, for the urban authorities have by express terms all the powers that may be necessary to deal with the roads.

But did the Legislature intend that the rural authorities, who are not expressly empowered by the Act to interfere with turnpike roads, should have power to do it. I see no reason, as I have said before, to think that it did not, and I think from the 32nd section that it did. That section provides that before commencing any sewage works *without the district* the local authority is to give a notice which shall describe the nature and intent of the work, and shall state the intended termini thereof, and the names of the parishes and the turnpike roads and streets and other lands, if any, through, across, under, or on which the work is to be made. There cannot be the slightest doubt, therefore, that the Act contemplated some work being done on a turnpike road by local authorities, and if confirmation were wanted, this confirms the view that they have power to interfere with a turnpike road in any way that is reasonably necessary for the purpose they have in view. As I said before, it does not by any means follow that by so doing they will injure the turnpike road in the least. I am, therefore, not pressed with the argument as to the meaning of the word "through" as to the turnpike road. But supposing the argument were valid, that the word "through," when used in connection with "turnpike road," is to be restricted to something not above the surface, or not far above the surface, it by no means follows that the meaning of the word is to be similarly restricted in another part of the section where it is not used in connection with a turnpike road. Moreover, the section goes on to say, "or under any cellar or vault," leaving out the words "through or across," shewing by thus using the word "under" alone that words which would authorize the carrying it over or through a cellar or vault were purposely omitted.

But then it is said, independently of this section they have power to purchase land, and that what they are doing is injuring

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the Plaintiffs to such an extent that it is equivalent to taking the whole of the land. Well, if what is done is equivalent to taking the whole of the land, the Plaintiffs will get compensation for the whole of the land. If what is left is worth nothing, then the Plaintiffs will get the full value. If what is left is worth anything, then they will get paid so much less, and may sell what is left, and so get the full value if they do not like to keep it. In what way the Plaintiffs are injured I cannot see. They are only entitled to be paid for what they lose, that is, to be paid for the value of the whole of the lands minus the value of what they keep, and they can sell the remainder.

Then I am referred to some cases, and, as usual with authorities on a question of this kind, they have very little bearing on the question of construction. Of course, I am bound by authorities on the construction of a public Act of Parliament, but the authorities to which I have been referred not only have no direct bearing on the matter before me, but in themselves, if I may say so, with great respect for the learned Judges who have decided them, seem to me to require further and considerable discussion, which I refrain from going into.

I may say that the principal authority to which I was referred, *Metropolitan Board of Works* v. *Metropolitan Railway Company* (1), was a case decided in the Court below by a majority of Judges against the opinion of a minority, and affirmed by the Exchequer Chamber again by a majority. Of course, a case of that kind is not the less an authority because it was not a unanimous decision; but still a Judge who is called upon to apply it ought to consider very carefully whether a case which gave rise to such a diversity of opinion between the learned Judges really governs the case before him, and when I come to look at it it does not apply at all. The simple point decided there was this: the board had made a sewer through somebody's land, and then the railway company, being the owners of the neighbouring lands, dug under their own land, and the consequence of their digging was that the sewer, not being constructed with sufficient strength to do without the lateral support of the neighbouring land, bulged and burst, and was no doubt seriously injured. It was urged that the rail-

(1) Law Rep. 3 C. P. 612; Ibid. 4 C. P. 192.

way company digging under their own land was the cause of the bulging and bursting of the sewer, and that it was a wrongful act. The answer was, "We have only dug under our own land, which we have a right to deal with in any way we think proper. You have no right to lateral support as an easement, for twenty years have not elapsed." This answer was conclusive, unless the Board of Works could shew a statutory right to lateral support. Now the only statutory right that they had was the power of constructing a sewer. The minority thought that this shewed the intention of the Legislature to be that the sewer, when constructed, should have a right to support; but the majority thought that as it was possible to construct the sewer so strongly that it could do without the lateral support, there was no necessity for implying a right to such support, and what they said was, in substance, this: "We cannot impute to the Legislature the intention to commit such an act of injustice as to take away from the owner of the soil the lateral support of which is wanted, the right to do what he likes with his own property, without giving him compensation, and as we read the Act of Parliament we can find no provision giving him compensation." (I do not discuss whether they read it rightly or wrongly.) "The right to compensation is confined to persons whose land is directly affected by the sewer being carried through or under it, and therefore, there being no provision for compensating the owners of adjoining lands, we think that no right is taken away from them, and consequently they are not liable in an action for withdrawing lateral support. That is the point which was decided. It has not only no direct application in favour of the Plaintiff's case, but when we come to examine it its indirect application is rather the other way. I gather that if the Judges had found a clause giving compensation to the owners of the adjoining soil, they would have decided the other way, and here I find the largest possible clause of compensation.

I am, therefore, of opinion that the motion should be refused, and, in accordance with the usual practice of the Court, the costs will be costs in the action.

C. A.

The Plaintiffs appealed from this decision. The appeal was heard on the 14th of February, 1877.

C. A. 1877

RODERICK v. ASTON LOCAL BOARD.

Argument.

Chitty, Q.C., and *Glen*, for the Plaintiffs, in support of the appeal:—

We say that it is against the scope of the Act that the board should take and permanently occupy the Plaintiffs' land on any other terms than those of buying it out and out. The words "into, through, or under" cannot be considered to authorize an occupation of the surface; if that had been intended we should have had the word "on," as in sect. 32, or "over," as in sect. 147, neither of which words is found in sect. 16, under which the Defendants are acting. It is not reasonable to suppose that, by the first part of sect. 16, where the words "through, across, or under" are used, the Legislature intended to allow the local authority to obstruct a turnpike road by carrying a sewer across it on a level. The cases under similar Acts are in our favour: *North London Railway Company* v. *Metropolitan Board of Works* (1); *Brownlow* v. *Metropolitan Board of Works* (2); *Metropolitan Board of Works* v. *Metropolitan Railway Company* (3).

Davey, Q.C., and *Woodroffe*, for the Respondents, were not called upon.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I am of opinion that the decision of the Master of the Rolls must be affirmed. It is said that great injustice may be done by this construction of the Act; but I think that the compensation clause will be sufficient to give adequate compensation (and there does seem a very strong case for compensation) for any damage which may be sustained. It may be said that it is very hard for a piece of a man's land to be taken away without his consent and without the Defendants buying it. On the other hand, if these local authorities were obliged to buy every property with which they required to interfere, it might become impossible to carry out the requisite sanitary arrangements for the district. Those considerations may tell one against the other. All we have to consider is, what is the plain meaning of the words of the Act; and in my opinion there is nothing sufficient to shew that when the

(1) Joh. 405. (2) 10 W. R. 384; 31 L. J. (C.P.) 140.
(3) Law Rep. 4 C. P. 192.

Legislature says the board may take its sewer "into, through, or under" land, that is to be taken only to mean "under." If the argument of the Appellants prevails, we must hold that the Legislature says, "You may go into, through, and under, but not on or over." I think we cannot introduce that exception into this clause.

Judgment, C. A.

BRAMWELL, J.A.:—

Bramwell, J.A.

I am of the same opinion. I confess I have some misgivings as to whether it was intended by the Legislature to give power to make a sewer above ground. Very likely the question never was thought of, most sewers being subterranean; and it may be, therefore, that words were used which go further than the actual intention of Parliament. On the other hand, it may be that, if their attention had been called to it, they would have used words sufficient to enable that to be done which is going to be done in this case. We have not, however, to speculate as to the intention of the Legislature, but to construe the words which they have used; and as to that, it appears to me nothing more can be said than has been said by the Lord Justice. If we read these words as Mr. *Chitty* wants us to read them, the word "through" has no meaning at all, and we must read the words with the copulative conjunction, "into, through, and under," instead of "into, through, or under."

AMPHLETT, J.A.:—

Amphlett, J.A.

I feel quite as strongly as Mr. *Chitty* that there might be cases of extreme hardship under this Act, according to the construction put upon it by the Master of the Rolls. A gentleman's residence might be spoiled by taking a sewer above ground over the centre of his garden or through a part of his house. But I think we cannot vary the plain language of the Legislature by any consideration of such circumstances as those; and perhaps it is a sufficient answer, as regards the hardship, to say that if anything was done vexatiously very heavy damages would be given. But however that may be, I find in the 16th section words that I cannot get over, and to which we are bound to give effect.

Solicitors: *Letts; Robinson & Preston.*

C. A.
1877
Feb. 21.

In re CAERPHILLY COLLIERY COMPANY.

PEARSON'S CASE

Company—Directors—Qualification given by Promoter—Misfeasance—Companies Act, 1862, *s.* 165.

A director of a company received from one of the promoters a number of paid-up shares sufficient to qualify him as a director, and then took an active part in carrying out a conditional contract for the purchase by the company of a colliery belonging to the promoters, and for purchasing and working which the company was formed:—

Held (affirming the decision of *Bacon*, V.C.), that the director was liable, under the 165th section of the *Companies Act*, 1862, to pay to the liquidator the value of the shares; and that in the present case the shares were to be taken as having been worth their nominal amount.

Statement.

THIS was an appeal by Sir *Edwin Pearson* from a decision of Vice-Chancellor *Bacon* (1).

The promoters of this company were *William Hannam* and two others, who purchased the colliery, and by an agreement of the 3rd of April, 1869, a Mr. *Bridell*, who appeared as nominal vendor, but was in fact agent or trustee for them, agreed with a trustee for the intended company to sell it to the company for £14,000, of which £7000 was to be paid in cash and £7000 in fully paid-up shares in the company. The articles were registered on the 12th of April, 1869, and, after a clause giving powers in general terms to the directors, came the following:—

"8. The powers so conferred upon and exercisable by the directors shall include, among others, the following:—

"To carry out the several objects set forth in the memorandum of association.

"To carry out and complete an agreement dated the 3rd day of April, 1869, made between *E. J. Bridell* and *George Hannam* on behalf of the company, for the purchase of the *Van Iron and Coal Works*, situate at *Caerphilly*, with underlease, plant, machinery, and utensils, which agreement is hereby adopted and confirmed by the company."

The company was registered with a nominal capital of £20,000

(1) 4 Ch. D. 222.

in 4000 shares of £5 each, and Sir *E. Pearson* subscribed the memorandum for one share. By clause 10 of the articles it was provided that "The qualification for the office of director shall be be the actual holding of at least twenty-five share warrants, each representing a single fully paid-up share in the company, and such share warrants shall, during the period each director remains in office, be deposited in his name with the bankers for the time being of the company, or with such other person or persons or in such place or places as the company shall in general meeting direct or appoint. A director shall be at liberty at any time to withdraw his share warrants from such deposit as aforesaid, but immediately upon his doing so he shall cease to be qualified to act, and shall no longer act as such director."

No directors were appointed by the articles, so the subscribers to the memorandum were, according to the *Companies Act*, 1862, Table A. (26), the first directors. A meeting of directors was held on the 19th of April, 1869, at which it was moved by Sir *E. Pearson*, and resolved, that 1400 shares should be allotted to *Bridell* on account of the purchase-money, and that the warrants should be held by the solicitor to the company till he was satisfied with the abstract of title. On the 26th of April, at another meeting of directors, the solicitor having reported satisfactorily as to title, a further resolution moved by Sir *E. Pearson* was passed for a further step towards the completion of the purchase, and instructing the solicitor to prepare form of receipt to be given by *Bridell* to the company. The purchase was shortly afterwards completed.

It was deposed that at the meeting of the 19th of April *William Hannam* either handed to Sir *E. Pearson* or deposited at the bankers of the company in his name certificates for twenty-five fully paid-up shares. Sir *E. Pearson* denied their having been handed to him, but at all events on or immediately after the 19th of April they stood at the bankers in his name, and were withdrawn by him on the 3rd of May, 1873. Sir *E. Pearson* had never paid anything for them, but he alleged that he took them in satisfaction of a debt due from *William Hannam* to him, the existence of which debt, however, the Court considered not to be proved.

Vice-Chancellor *Bacon* having ordered Sir *E. Pearson* to pay to

C. A. 1877

PEARSON'S CASE.

the official liquidator the sum of £125 in respect of these shares, Sir *E. Pearson* appealed.

Argument.

Sir *H. Jackson*, Q.C., *Jencken*, and *Ingle Joyce*, for the Appellant:—

The case is similar to *Brown's Case* (1), where *Brown* was held to be under no liability. *McKay's Case* (2) is quite different. There is nothing here that can fairly be considered as a bribe. A promoter has to find directors; he finds persons who are willing to give trouble, but not to give money in addition; there surely is nothing fraudulent in his finding them a qualification.

[JAMES, L.J.:—A director accepts a present of shares before the contract for purchase of the colliery has been completed. He has then a direct interest in having it completed, though the circumstances might be such as to entitle the company to be relieved from the contract.]

At all events, no more ought to have been done than to direct an inquiry what the shares were worth.

Kay, Q.C., and *Method*, for the official liquidator, were not called upon.

Judgment, Jessel, M.R.

JESSEL, M.R.:—

The application to make Sir *Edwin Pearson* liable for the sum of £125, for which he has been made liable by the Vice-Chancellor, from whose decision this appeal is brought, is made under the 165th section of the *Companies Act* of 1862. That section is very large in its terms, and gives the Court a wide discretion, to be exercised, of course, like every other judicial discretion, according to the settled principles of law. The section (omitting the parts not material for the present purpose) enacts that "Where, in the course of the winding-up of any company under this Act, it appears that any past or present director has been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of any liquidator, examine into the conduct of such director and compel him to contribute such sums of money to the assets of the company by way of compensation

(1) Law Rep. 9 Ch. 102. (2) 2 Ch. D. 1.

in respect of such misfeasance or breach of trust as the Court thinks just."

The question we have to decide is whether Sir *Edwin Pearson* has committed a misfeasance or breach of trust for which he is liable at all, and if so, for what amount he ought to be made liable. It appears that this *Caerphilly Colliery Company* was got up or promoted by certain individuals of whom Mr. *William Hannam* was one, Messrs. *Moore & Delatorre* apparently being the others, and Mr. *Bridell* a person whose name is made use of as an agent or trustee for them. Those three promoters were, it appears, actual vendors to the company of the colliery, for working which the company was formed. It appears that by a contract dated the 3rd of April, which I take to be in substance contemporaneous with the memorandum and articles of association dated the 6th of April, this colliery was to be sold to the company partly for cash and partly for a certain number of paid-up shares; and it further appears by the articles of association of the company that, as regards paid-up shares, share warrants were to be issued in accordance with the terms of the *Companies Act*, 1867. It further appears that Mr. *William Hannam* endeavoured to obtain directors to carry out this arrangement, which no doubt was a highly beneficial one for him, and among other persons he applied to Sir *Edwin Pearson*, who consented to become a director of the company. Whether or not Sir *Edwin Pearson* cared to inquire as to the position of Mr. *Hannam*, I cannot find out from the evidence, but that he must have known that Mr. *Hannam* had some interest in getting up the company is plain. He admits that he assisted Mr. *Hannam* very much in getting up the company, and that he expected to be paid for his services; he knew, therefore, that Mr. *Hannam* was the promoter and getter-up of the company. Mr. *Hannam* himself says, "I was one of the purchasers of the colliery from *Ashurst & Morris*," *i.e.*, the original vendors. (This is the old story. The promoters buy from the original owners of the colliery, and sell to the company at a large profit.) "I was one of the purchasers of the colliery from *Ashurst & Morris*. I was one of the sellers of the colliery through Mr. *Bridell*, and acted as trustee for Messrs. *Moore & Delatorre*, who were concerned with him in the matter and myself. That is how I became pos-

C. A. 1877 — PEARSON'S CASE. — Judgment, Jessel, M.R.

sessor of the shares;" *i.e.*, the paid-up shares in the company which were turned into share warrants, twenty-five of which were given to Sir *Edwin Pearson*. Then he is asked in his first examination, "What had you to do with the bringing out of it?"—*A.* "I was a part purchaser and promoter." *Q.* "Had you any connection with Sir *Edwin Pearson* at the time of bringing it out?"—*A.* "I had." *Q.* "What?"—*A.* "Sir *Edwin Pearson* had seen a gentleman named *Moore* and Mr. *Delatorre*. I knew Sir *Edwin Pearson* previously, but I believe I did not, as far as my memory serves me—I believe I did not ask personally Sir *Edwin Pearson* to be a member of the board of the new company; I think not." *Q.* "Did you know that he was going to be?"—*A.* "Yes. Messrs. *Moore & Delatorre* either asked Sir *Edwin Pearson* to call on me or introduced him." *Q.* "'I handed to him twenty-five share warrants,' you say?"—*A.* "Yes, twenty-five share warrants." *Q.* "What share warrants were they?"—*A.* "They were share warrants that came to me by virtue of my being a promoter of the company; they were part of the purchase payment of the colliery." *Q.* "At that time did Sir *Edwin Pearson* give you any consideration whatever for those share warrants?"—*A.* "No." Then further on: *Q.* "What were they handed to him for?"—*A.* "To qualify him for a seat at the board." So that the arrangement between Sir *Edwin Pearson* and the person whom he knew to be a promoter of the company, and into whose actual position (I will take it most favourably) he did not care to inquire, but who really was one of the principal vendors to the company, was, that this person gave Sir *Edwin Pearson* twenty-five share warrants, part of the purchase-money for the property, and to do what? To enable him to act as a director on the board, to carry out this very contract for the sale to the company at a very large profit. Sir *Edwin Pearson* took not only a part, but an active part, in carrying out the contract. [His Lordship here referred to the meetings of the 19th of April and the 26th of April, 1869, above mentioned.]

That being the position of Sir *Edwin Pearson*, can he be allowed to say in a Court of Equity that he, having received a present of part of the purchase-money, and being knowingly in the position of agent and trustee for the purchasers, can retain that

present as against the actual purchasers? It appears to me that, upon the plainest principles of equity and good conscience, he cannot. Whether the purchase was or was not an advantageous one for the company, whether the property which they purchased at this large profit was or was not worth the increased price that they paid for it, is a question wholly immaterial for us to consider; he cannot, in the fiduciary position he occupied, retain for himself any benefit or advantage that he obtained under such circumstances. He must be deemed to have obtained it under circumstances which made him liable, at the option of the *cestuis que trust*, to account either for the value at the time of the present he was receiving, or to account for the thing itself and its proceeds if it had increased in value. The company elect on the present occasion to ask to charge him with the value of the twenty-five share warrants at the time of their delivery.

The next point that we have to consider is, whether the Vice-Chancellor arrived at a right conclusion in deeming that the value was £125. In the first place, it is to be noticed that by the contract of purchase half of the £14,000 was to be taken in fully paid-up shares, though that of itself of course is not conclusive evidence that the shares were worth their full nominal value. But then we find that at the very time when these paid-up shares were allotted the public were applying for shares at par, and it is therefore to be presumed that the public would have given the same price for the twenty-five shares which they were paying for the other shares for which they applied, and I find that on the 19th of April, on which the first resolution was passed, 1370 shares were allotted to the public, so that if these twenty-five shares had not been taken by Sir *Edwin Pearson* they could have been allotted to the public upon the same day at their par value. [His Lordship then entered into the consideration of some evidence tending to shew that Sir *E. Pearson* had considered and treated the shares as being worth their nominal amount.] I think, therefore, there is ample evidence in warranting the Court of Appeal in coming to the same conclusion as the Vice-Chancellor did, that this gentleman should be charged with £125 as having been the value of this present at the time he received it. I think that the Court of Appeal in a case like this ought not to be astute in discovering

C. A. 1877 PEARSON'S CASE.

reasons for not being satisfied with the evidence which was found satisfactory in the Court below, and I must say, speaking for myself alone, that if I had had to decide the case originally, I should have come to the same conclusion as the Vice-Chancellor.

Judgment, C. A.

I am of opinion that the appeal must be dismissed.

James, L.J.

JAMES, L.J.:—

That a gentleman in Sir *Edwin Pearson's* position should have allowed this matter to be discussed in one Court is strange enough; that it should have been brought up by him for further discussion in a Court of Appeal surpasses my comprehension. He may not have been fully sensible of what he was doing when he took this gratuity from the vendors, but when he had time and means fully to consider and be advised on what he, a trustee, really had done, he ought only to have been too glad to restore it to the company for whom he was trustee.

Baggallay, J.A.

BAGGALLAY, J.A.:—

I agree in the opinion that the judgment of the Vice-Chancellor should be affirmed, and I fully concur in the reasons that have been adduced by the Master of the Rolls, and I do not think it necessary to add anything to them.

Solicitors: *Bolton & Co.; H. C. Godfray.*

C. A. 1877 *March* 14.

MELLOR *v.* SIDEBOTTOM.

[1876 M. 335.]

Practice—Motion for Order on Admission in the Pleadings—Rules of Court, 1875, *Order* XL., *r.* 11.(a)

SQBD 657

An action having been commenced in November, 1876, to enforce an equitable mortgage with written memorandum dated in February, 1876, the Defendant admitted the mortgage, but alleged, by way of defence, that it was part of the agreement that the Plaintiff should not require a legal mortgage, nor any payment of principal or interest for a year from the time of the advance. The Plaintiff moved for the ordinary foreclosure decree on the

case 11 M (1875) 0 W N 359

admissions in the pleadings; and the motion was refused by Vice-Chancellor *Hall*:—

Held, on appeal, that the Vice-Chancellor had a discretion as to whether a case was a proper one for making an order on motion under Rules of Court, 1875, Order XL., rule 11, and that the Court of Appeal ought not to interfere with the exercise of that discretion.

C. A. 1877 MELLOR v. SIDEBOTTOM.

Statement.

THIS was an action to enforce an equitable mortgage.

The writ, issued the 24th of November, 1876, was indorsed with a claim "to have an account taken of what is due to the Plaintiff for principal, interest, and costs on a mortgage by deposit of title-deeds made the 4th day of February, 1876, and that the mortgage may be enforced by foreclosure or sale."

The statement of claim alleged that, by a memorandum of deposit dated the 4th of February, 1876, the Defendant, after acknowledging that the Plaintiff had advanced him £5000 on the security of the title-deeds therein mentioned, charged the property comprised in the deeds with the payment of the £5000 on demand, with interest at £5 per cent. per annum, with power to the Plaintiff to sell at any time, and an agreement for further security.

The Defendant, by his statement of defence, stated: "In the early part of the year 1876 the Defendant requested the Plaintiff to lend him £5000 for a year certain, which the Plaintiff agreed to do if the Defendant would deposit with him, as a collateral security, the title-deeds mentioned in the statement of claim; whereupon the Defendant deposited the said title-deeds with the Plaintiff. It was the essence of the said agreement, on the faith of which and in part performance whereof the said title-deeds were deposited with the Plaintiff, that the Plaintiff should not require a legal mortgage, nor sell the property, nor require the Defendant to repay the said loan, nor require the Defendant to pay any interest thereon in the meantime, until the expiration of the said year."

The Plaintiff, by his reply, denied that the agreement contained in the memorandum was in any way qualified, as alleged by the Defendant, and proceeded to say that the alleged qualifications, if agreed upon at all, being oral only, and not put into writing, could not affect his rights under the written agreement.

C. A. 1877 MELLOR v. SIDEBOTTOM.

On the 9th of February, 1877, the Plaintiff gave notice of motion for an order to the same effect as the common foreclosure decree on the admissions in the pleadings. Vice-Chancellor *Hall* refused the motion with costs. The Plaintiff appealed.

Argument.

Karslake, Q.C., and *R. Collier*, for the Plaintiff:—

This defence is demurrable. The written agreement cannot be modified by parol: *Ford* v. *Yates* (1). The Plaintiff, therefore, is entitled to an order: *Gilbert* v. *Smith* (2).

Dickinson, Q.C., and *Jemmett*, for the Defendant:—

The Vice-Chancellor thought that a motion for a decree upon admissions in the pleadings was not the proper mode of trying whether a defence was demurrable.

Judgment.

JESSEL, M.R.:—

We think that this is a case in which the Judge has a discretion, with the exercise of which we ought not to interfere. These applications come on upon an ordinary motion day, and it would be very inconvenient if parties were entitled as a matter of right to interfere with the ordinary motions by bringing on in this form questions which might be better decided on demurrer or at the trial; and we consider that the Judge has a discretion as to whether a case involves questions which cannot conveniently be disposed of on a motion of this kind.

JAMES and MELLISH, L.JJ., and BAGGALLAY, J.A., concurred.

Solicitors: *J. E. Fox & Co; Field, Roscoe, & Co.*

(1) 10 L. J. (C.P.) 117.

(2) 2 Ch. D. 686.

Ex parte WEIL. *In re* MENTROP.

C. A. 1877 April 19.

Composition—Registration of Resolutions—Time for taking Objection to Proof—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 125, 126, 127—*Bankruptcy Rules*, 1870, *rr.* 271, 284, 295.

An objection to the proof of a creditor who has voted at the first meeting of creditors on a composition resolution is in time if taken at the second meeting.

Semble, that the objection would be in time if taken after the second meeting and before the registration of the resolution.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, sitting as Chief Judge in Bankruptcy.

On the 27th of April, 1876, *J. Mentrop* and *S. Simon*, who traded as *J. Mentrop & Co.*, filed a liquidation petition. The first meeting of the creditors was held on the 22nd of May, when a resolution accepting a composition of 2*s.* in the pound was carried by the statutory majority. Two creditors, named *Klauss* and *Wald*, were among those who voted in favour of the composition, and without their votes the resolution would not have been carried. At the second meeting of the creditors, on the 1st of June, *G. Weil*, a creditor who had voted against the composition, objected to the proofs of *Klauss* and *Wald*, but their votes were admitted, and the resolution was confirmed. *Weil* gave notice of his intention to insist on his objection upon the application to register the resolutions. He alleged that between the first and second meetings facts had come to his knowledge which shewed that no debt was due to either *Klauss* or *Wald*. When the application for registration came on to be heard by Mr. Registrar *Keene*, it was contended on the part of the debtors that the objections to the proofs, not having been taken at the first meeting, were taken too late. The Registrar was of opinion that this was so, and refused to allow *Weil* to adduce evidence in support of his objections, and registered the resolutions. *Weil* appealed to the Chief Judge, and Mr. Registrar *Hazlitt*, sitting as Chief Judge, affirmed the decision of Mr. Registrar *Keene*.

Weil appealed from this decision.

C. A. 1877 *Ex parte* WEIL. *In re* MENTROP. Argument.

J. Beaumont, for the Appellant:—

There is no reason why the objections should not be taken at the second meeting; neither the Act nor the Rules say that objections to proofs must be taken at the first meeting. The Registrar has to decide on the validity of objections upon hearing the application to register the resolutions: *Bankruptcy Act*, 1869, ss. 125, 126; Bankruptcy Rules, 1870, r. 295.

[MELLISH, L.J.:—If the objection was not taken at either of the meetings, would it be too late to take it upon the presentation of the resolutions for registration?]

It would be in time then, though, of course, notice must be given of the intention to raise it. The argument against me must amount to this, that the statutory affidavit of proof is final and conclusive. The debt may be fictitious, and before the first meeting a dissentient creditor may have no means of knowing anything about the debts of the other creditors.

[MELLISH, L.J.:—If the resolutions are registered the registration is conclusive in the absence of fraud.]

Yes: Bankruptcy Rules, 1870, r. 301; *Ex parte Walter* (1).

Doria, and *Holmes Poulter*, for the debtors:—

If, as is suggested, the debts are fictitious, the registration can be cancelled on the ground of fraud: *Bankruptcy Act*, 1869, s. 127.

[MELLISH, L.J.:—A proof may be made *bonâ fide*, and yet no debt may exist.]

Objections to a proof ought to be marked on it by the chairman at the meeting at which the proof is used: Bankruptcy Rules, 1870, r. 271. And proofs must be filed within three days: Rule 284.

Judgment.

JAMES, L.J.:—

The Registrar must inquire into the validity of these objections. It would open the door to any amount of fraud if fictitious proofs could be made in this way. It is conceded that if the objections had

(1) 2 Ch. D. 326.

C. A. 1877 *Ex parte* WEIL. *In re* MENTROP.

been taken at the first meeting, their validity must have been tried by the Registrar. Why, then, should not an objection be taken at the second meeting, or even not until the application for registration? The objecting creditor might be an entire stranger to the creditor to whose proof he objects. The case must go back to the Registrar, and the registration must be cancelled. If the evidence satisfies the Registrar that the objections are unfounded he can then register the resolution again.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors for Appellant: *Learoyd & Co.*
Solicitor for Debtors: *L. Goldberg.*

FLOWER *v.* LOCAL BOARD OF LOW LEYTON.

C. A. 1877 V.-C. M. *Feb.* 12. C. A. *April* 26.

[1876 F. 92.]

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 264—*Notice of Action—Action for Injunction.*

Where the principal object of an action against a local board of health is an injunction to restrain an immediate injury, it is not necessary to give a month's notice of the cause of action under the 264th section of the *Public Health Act*, 1875. And it makes no difference that damages are claimed by way of subsidiary relief.

The decision of *Malins*, V.C., reversed.

Statement.

THIS was an action by the lessee and occupier of a farm at *Leyton*, within the district of the Local Board of Health for *Low Leyton*. The claim stated that part of the Plaintiff's land consisted of a field called *Blackbird's Field*, on one side of which ran a ditch, and the sewage water from the ditch, together with solid sewage matter in considerable quantity, was from time to time discharged from the ditch and covered a portion of *Blackbird's Field*, which was injurious to the Plaintiff's crops. The sewage water had for more than two years occasionally overflowed the ditch, and the Plaintiff had on several occasions complained thereof, but until the last nine or ten months the amount of such overflow was comparatively insignificant, and the damage was not of the serious

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character which it had within that time assumed. After several complaints to the Defendants they had promised to abate the nuisance, but, in fact, it never had been abated. The Plaintiff had also made frequent applications to the Defendants for compensation on account of the damage already caused to him by reason of the overflow of the ditch; but at a meeting of the Defendants' board on the 13th of June, 1876, it was unanimously resolved to repudiate every claim made by the Plaintiff.

The action was commenced on the 4th of July, 1876, and the Plaintiff claimed that the amount of damages which had been or should be sustained by the Plaintiff by reason of the overflow of sewage and water from the ditch might be assessed, and that the Defendants might be ordered to pay the amount thereof to the Plaintiff; and that the Defendants, their servants, officers, and agents, might be restrained by injunction from causing or permitting any sewage or water to overflow from the said open ditch on to *Blackbird's Field* or any part thereof. And that the Defendants might be ordered to pay the costs of the action.

The local board for *Low Leyton*, by their answer, stated that they had entered into a contract for the construction of a complete system of sewers, upon the completion of which the open ditch by the side of the Plaintiff's field would be entirely freed from sewage and receive nothing but land water; and such system of sewers was now in course of construction, and was being pushed forward without delay. The Plaintiff was informed of this proposed system of sewers, and expressed himself satisfied therewith in a letter dated the 23rd of February, 1876.

The Defendants did not admit that any damage had been caused to the Plaintiff. And as a separate and independent ground of defence the Defendants stated that they were a local authority within the meaning of the *Public Health Act*, 1875 (38 & 39 Vict. c. 55), and that no such notice of action, stating the cause of action, and the name and place of abode of the intended Plaintiff and of his attorney or agent in the cause, as prescribed by the 264th section (1) of the Act, was served on the Defendants prior to the

(1) 38 & 39 Vict. c. 55, s. 264, is as follows:—"A writ or process shall not be sued out against or served on any local authority, or any member thereof, or any officer of a local authority, or any person acting in his aid, for any

issuing of the writ in this action, and on this ground also the Defendants claimed a judgment in their favour with costs.

The Plaintiff demurred to this separate ground of defence. The demurrer was heard before Vice-Chancellor *Malins* on the 12th of February, 1877.

J. Pearson, Q.C., and *Shebbeare*, for the Plaintiff.

Glasse, Q.C., and *H. A. Giffard*, for the Defendants.

MALINS, V.C. :—

Judgment, V.-C. M.

The object of the Legislature in inserting the 264th clause of the *Public Health Act* appears to me very plain. It was no doubt intended that as these boards were to have jurisdiction over very extensive districts they were not to be liable to be constantly vexed with actions, but in every complaint made against them they should have reasonable notice of the cause of action, in order that they might set themselves right in case of any wrong having been done. It is clear, therefore, that where damages only are the principal object, the Act of Parliament, which is similar in this respect to the words of the *Metropolitan Management Act*, requires that notice should be given to the local board. But it is said that this does not apply where the object is to prevent an irreparable mischief being done; to prevent, for instance, a stream from being stopped, where a speedy remedy by injunction is required, and where the object, in case of any delay, may be injurious to the person complaining. I agree, in that case, that the section would not apply, and an action might be brought at once for an injunction. But as the Legislature has said, there is to be no writ issued without a month's notice of the cause of action, I think the proper construction of the Act is, that no writ should be issued

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thing done or intended to be done or omitted to be done under the provisions of this Act, until the expiration of one month after notice in writing has been served on such local authority, member, officer or person, clearly stating the cause of action and the name and place of abode of the intended Plaintiff, and of his attorney or agent in the cause; and on the trial of any such action the Plaintiff shall not be permitted to go into evidence of any cause of action which is not stated in the notice so served; and unless such notice is proved the jury shall find for the Defendant."

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without notice, except in cases of necessity; and though a Plaintiff may say there is necessity, still the Court must look at all the circumstances to see whether such necessity really exists for an injunction, or whether the real claim is not for compensation in damages. In the case of *Attorney-General* v. *Hackney Local Board* (1), before Vice-Chancellor *Bacon*, the sole object was an injunction, though at the same time the Plaintiff asked for damages. I should go further, and say that if in a case which is not immediately urgent, a Plaintiff files a bill for an injunction, and does not move for an injunction, it shews that his case is not one requiring an immediate remedy, and that that ought to be conclusive against the Plaintiff. I am asked to overrule this demurrer, on the ground that the principal object of the action is to obtain an injunction. If that were so, I should apply the doctrine which Vice-Chancellor *Bacon* did in that case.

Now, to ascertain whether an injunction is the principal object, I must look at the allegations in the claim. What the Plaintiff claims, in the first place, is to have an account of damages which have been or shall be sustained by reason of the overflow of sewage and water. Therefore the principal object put forward is damages; and in the second place, he claims an injunction to restrain the Defendants from permitting any sewage or water to flow over his land. I am decidedly of opinion that the principal object is not an injunction, which if it had been would long ago have been moved for. But it is for damages. It appears from the statements in the claim that the Plaintiff on several occasions complained to the Defendants, but, he says, notwithstanding such repeated complaints, and notwithstanding promises by the Defendants that the nuisance should be abated, the said nuisance has not been reduced, but still continues to the great damage of the Plaintiff. Then he says that he has also made frequent applications to the Defendants for compensation on account of the damage already caused to him by reason of the overflow, but the Defendants have neglected and refused to make any such compensation.

Now, therefore, I am bound to look at the conduct of the parties, and I think it is conclusively shewn that an injunction was not the object of the Plaintiff, because, although the action

(1) Law Rep. 20 Eq. 626.

was commenced on the 4th of July he did not move for an injunction. That of itself I should not regard as conclusive, but it is made quite manifest by the claim itself, the statement of which, from the beginning to the end, shews clearly that compensation for the damage sustained is the primary object, and that an injunction is altogether subsidiary to that object. It is, in fact, a claim for damages, and damages only; therefore on principle, as well as authority, it is a case which falls distinctly within the 264th section of the Act, and notice of the cause of action ought to have been given to the Defendants.

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As to the mode of conducting the case, this is under the new system. The case comes on upon demurrer to the separate and independent ground of defence. I am disposed to think that the more appropriate mode of proceeding would be, when an action is brought for an injunction to which the Defendants have a technical defence of this nature, to move to stay the action at once. However, that course was not adopted, but a defence has been put in, and now the Plaintiff demurs to that particular part of the defence. The demurrer must, therefore, be overruled, and in the ordinary way, with costs.

From this decision the Plaintiff appealed. The appeal was heard on the 26th of April.

C. A.

J. Pearson, Q.C., and *Cracknall*, for the Appellant:—

Argument.

This objection is taken by demurrer under Rules of Court, 1875, Order XXVIII. r. 1, by which any party may demur to any pleading or part of a pleading setting up a distinct ground of defence. The section of the Act relied on does not apply to a case like this where an injunction is prayed to restrain an immediate injury. That was decided by Vice-Chancellor *Bacon* in *Attorney-General* v. *Hackney Local Board* (1), where the question arose under the *Metropolis Management Act*, 25 & 26 Vict. c. 102, which contains a clause precisely similar to this 264th section.

H. A. Giffard (*Glasse*, Q.C., with him), for the Local Board:—

In the case of *Attorney-General* v. *Hackney Local Board* the

(1) Law Rep. 20 Eq. 626.

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claim was for an injunction to restrain an immediate injury. Here, on the contrary, the remedy sought is, in the first place, compensation in damages, and the injunction asked for is secondary to the main object of the action. The writ was issued on the 4th of July last, and if the damage had been so immediate the application for an injunction should have been made at once. There was plenty of time for serving the notice required by the Act, and under any circumstances, the defence is good as regards the claim for damages.

Judgment, C. A. JESSEL, M.R.:—

I think it is impossible to hold that the 264th section of the *Public Health Act* applied to a bill in the Court of Chancery for an injunction to restrain a serious or irreparable injury requiring the intervention of the Court. The section was intended to apply to an action at law for damages, and its object was to give an opportunity to a local authority to make payment or tender of compensation for the damage sustained. It could not be intended to apply to a case where the local authority was improperly pulling down a house, for instance, or stopping up a sewer. If that were so it would amount to a license to every local board to do what injury they pleased while the month's notice was running. It cannot be seriously contended on the statements in the present claim, that if a suit had been brought in the Court of Chancery the Court could not have interfered by injunction. That being so, all the jurisdiction of the Court of Chancery has been transferred to the High Court of Justice. The result is, that the only question in the case is whether it is a mere action for damages or a case in which a bill would have been filed in the Court of Chancery for an injunction. I am satisfied that the real object of the action was to prevent the continuance of an intolerable nuisance which the Plaintiff says he has suffered through the acts of the Defendants. It is true that the claim also asks for damages, but the reason of that is, that Courts of Equity were in the habit of giving damages to the hearing of the cause; but the Courts of Common Law only till the issuing of the writ. It was therefore usual to ask for damages in an equitable proceeding. But the claim for

damages is only subsidiary to the claim for an injunction. The Plaintiff's demurrer to the defence must therefore be allowed.

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JAMES, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *Houghtons & Byfield; R. T. Wragg.*

In re BARROWS' TRADE-MARKS.

C. A. 1877 V.-C. M. *March* 1. C. A. *April* 26.

Trade-mark—Combination—Words or Devices indicating Quality—Device common to the Trade—Trade Marks Registration Act, 1875 (38 & 39 *Vict. c.* 91)—*Trade Marks Registration Amendment Act*, 1876 (39 & 40 *Vict. c.* 33).

The applicants, who were iron manufacturers, had for a long period before the passing of the *Trade Marks Registration Act*, 1875, been in the habit of using as trade-marks the letters B B H, which were the initials of the firm, and also the same marks coupled with symbols or words common to the trade, denoting the quality of the iron:—

Held, by *Malins*, V.C., that every mark, or combination of marks or words used as a trade-mark before the passing of the *Trade Marks Registration Act*, 1875, which would have entitled the proprietor to maintain a suit for infringement against any person imitating it, may be registered as a trade-mark under the Act, and a trader is entitled to register a series of such marks which only differ from each other by combining in different modes a mark common to all of them and peculiar to the trader, with words merely indicative of the quality of the goods marked or symbols common to the trade, a note being in such a case entered in the register specifying the portions of the combination as to which no exclusive right is claimed.

Held, by the Court of Appeal, that the proper mode of registration was to register the trade-mark B B H to be used either alone or with any device or words signifying the quality of the iron.

Statement.

THIS was a motion under the *Trade Marks Registration Act*, 1875, and the *Trade Marks Registration Amendment Act*, 1876, by *William Barrows*, *Thomas Hill Barrows*, and *Joseph Barrows*, as persons aggrieved within the meaning of the 5th section of the Act of 1875, asking that the register of trade-marks under the Act might be rectified by entering thereon the names of the applicants as the proprietors of several trade-marks specified in the schedule to the notice, with such explanations as the Court might think proper, to the effect that the symbols of a crown and a horse-shoe, or the words "Plating," "Special," "Best," "Scrap," "Extra," "Treble,"

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"Charcoal," "Chain," and "Rivet," therein used, were common to the iron trade, or, in the alternative, that the register might be rectified by removing therefrom the symbol of a crown in a trade-mark entered on the register on the 4th of October, 1876, in the name of *E. P.* and *W. Baldwin*, of *Weldon Ironworks*, near *Stourport*, and by removing therefrom the said symbols and words in all trade-marks, including any of such symbols and words, and applying to iron plates, sheets, bars, hoops, strips, and rods.

The applicants were the present members of a firm now carrying on business as manufacturers of iron at the *Bloomfield Works*, *Tipton*, *Staffordshire*, as *William Barrows & Sons*.

The business had been carried on for many years, the earlier trading name being *Bradley, Barrows, & Hall*. The present firm were accustomed to mark the iron manufactured by them with certain marks, varying according to the quality and description of the iron, of which the letters B B H, the initials of the former trading name, were a principal ingredient. Some of the marks were used as early as the year 1836, and some had been adopted subsequently, but the whole series had been in use for many years. They had received to a certain extent judicial recognition in a suit of *Hall* v. *Barrows* (1), to take the accounts of a partnership on the death of a former partner, when they were treated as a valuable asset of the business, and the estimated value was apportioned, together with the good-will of the business, between the remaining partners and the representatives of the deceased partner.

Many of the trade-marks were known in different foreign countries, and had been registered as trade-marks in one or more places in *Europe*.

The trade-marks now claimed by the applicants as belonging to the business were thirty-two in number, and on the 21st of January, 1876, they made the proper application under the *Trade Marks Registration Act*, 1875, to have twelve of these marks registered. They were as follows:—

No. 1. The letters B B H, with a crown above them.

No. 2. The letters B B H, with the word BLOOMFIELD underneath.

(1) 4 D. J. & S. 150. 10 Jur N.S. 55.

No. 3. The letters B B H and a crown, as in No. 1, but followed by a horse-shoe.

No. 4. The letters B B H in an oval.

No. 5. The word VIZCAYA. This was afterwards withdrawn.

No. 6. Like No. 1, with the addition below it of the letters PLATING.

No. 7. B B H, followed by a crown.

No. 8. B B H, followed by the letters BLOOM.

No. 9. The word BLOOMFIELD alone.

No. 10. The letters B B H, with the word BLOOM below them.

No. 11. The word BLOOM alone.

No. 12. The letters B B H, followed by the words SPECIAL BEST, BEST.

The remaining twenty marks, which, though not included in the first application to the Registrar, were covered in principle by the present motion, and were the subject of a later application for registration, but, in consequence of the questions raised on the first application, had not yet been advertised.

Of the twelve marks included in the application to the Registrar eleven were duly advertised in the *Trade Marks Journal*, under Class 5, on the 31st of May, 1876, by the numbers 1480, 1481, 1482, 1483, 1485, 1486, 1487, 1488, 1489, and 1491, and No. 12 was advertised on the 4th of November, 1876; and in November, 1876, the applicants received a notice from the Registrar to the effect that the marks had been duly advertised, and would be registered. But shortly afterwards the following letter was received by them from the Registrar of Trade-marks:—

"I regret to have to inform you that in the pressure of business a circular letter was by mistake addressed to you stating that upon payment of £6 the marks applied for by your firm would be placed upon the register.

"It appears, however, from an examination of the marks applied for in Class 5 that a representation of a crown, a horse-shoe, and the words 'Best,' 'Bloom,' 'Plating,' and many others denoting various qualities of iron, were so commonly used in the iron trade at the date of the passing of the Act as to prevent their being registered under the *Trade Marks Act* as the private marks of any individual or firm.

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"You will observe in sect. 10 of the *Trade Marks Act* of 1875 that only '*distinctive*' devices, marks, words, or combinations of figures or letters used as a trade-mark before the passing of the Act may be registered as such under this Act.

"Under the circumstances, I shall only be able to place upon the register one of your marks consisting of the letters B B H, with one or more of the common marks (*i.e.*, 1480, 1482, or 1485), and Nos. 1481, 1483, and 1488.

"Before, however, placing upon the register a mark containing a device common to the trade, that is to say, in your case one of the three Nos. 1480, 1482, or 1485, it will be necessary to amend the description of the mark by adding a reference to these common parts. For instance, your mark No. 1482 would be described as consisting of 'the letters B B H in connection with a crown and horse-shoe, the crown and horse-shoe being devices common to the iron trade.'

"On your informing me which of the marks, 1480, 1482, or 1485, you would desire to have registered, a fresh circular letter will be addressed to you, and the registration fees forwarded by you for the marks which cannot be registered will be returned."

Further correspondence took place, in the course of which the Registrar withdrew his objection to the registration of the word "Bloom" as part of a trade-mark, but continued to decline to register the remaining marks to which he had objected.

A trade-mark had been registered on the 4th of January, 1876, on behalf of the Respondents, Messrs. *E. J.* and *W. Baldwin*, consisting of the word "*Arley*," in combination with a crown, with the explanation that the crown was a symbol common to the trade.

The present notice of motion was accordingly given in order to raise the question of the right of the applicants to register all the marks which they claimed, and came on to be heard before Vice-Chancellor *Malins* on the 1st of March, 1877.

Argument.

Southgate, Q.C., *Bristowe*, Q.C., and *W. P. Beale*, in support of the motion:—

There is no question raised as to the validity of these trade-marks, and they have been recognised as valuable assets of the

business in *Hall* v. *Barrows* (1). The Registrar has in fact recognised the principle which the applicants desire to apply by registering the designs of the Respondents, which also contained marks common to the trade. All the marks in question come within the definition of the 10th section of the Act of 1875, "any special and distinctive word or words or combination of figures or letters used as a trade-mark before the passing of this Act," and therefore may be registered, notwithstanding the strict construction which seems to have been put upon the Act with regard to new marks in *Ex parte Stephens* (2). The applicants here would be liable to three sources of injury if all the marks were not registered. They would run the risk of a loss of their rights under sect. 3 of the Act, they would incur a difficulty in obtaining registration abroad, it being impossible to make a selection of marks which would be suitable for all countries, and there would be the danger of adverse rights being acquired by registration by other persons.

Rigby (Sir *J. Holker*, A.G., with him), for the Registrar of Trade-marks:—

The Registrar in administering the Act follows the directions of the Commissioners of Patents. This is, therefore, an appeal from those Commissioners where their judgment is conclusive: *Re Meikle's Application* (3).

The applicants are not really injured by the refusal to register, because the Act of 1876 gives a right of action in the case of trade-marks which the Registrar has refused to register. The register comprises in fact only trade-marks as defined by the Act, and contemplates the existence of other trade-marks which are not registered. The reason for excluding the marks is that to place them on the register would be to give a *primâ facie* right, and so in process of time exclude others from using symbols which are either common to the trade or merely designate quality. Marks merely indicating quality are not trade-marks, not being distinctive of any particular manufacturer: *Raggett* v. *Findlater* (4). If such marks are allowed to be registered the words "special and distinctive" must be struck out of the Act.

(1) 4 D. J. & S. 150. 10 Jur. N.S. 555.
(2) 3 Ch. D. 659.
(3) 24 W. R. 1067. W.N. (1876) 248.
(4) Law Rep. 17 Eq. 29.

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[MALINS, V.C.:—I should not have considered the words "Special Best, Best" by themselves as being properly the subject of registration, but it does not follow that words of description may not be part of a trade-mark, as in *Lee* v. *Haley* (1).]

Argument.

The question is, whether the marks are capable of registration. The words objected to are such as could not be registered by themselves, and, having regard to the words of the Act, cannot be registered in combination with other marks. *Raggett* v. *Findlater* (2) would have been an authority for refusing an injunction if this had been a suit for infringing these marks instituted before the *Trade Marks Registration Act* came into force.

J. Pearson, Q.C., and *Carpmael*, for Messrs. *E. J.* and *W. Baldwin*, did not object to the registration of the applicants' marks.

Judgment, V.-C. M.

MALINS, V.C.:—

This is an application under the *Trade Marks Registration Act*, 1875, and the *Trade Marks Registration Amendment Act*, 1876. It appears that the original firm of *Bradley, Barrows, & Hall*, of which the applicants are now the partners, had from a very early period been in the habit of using trade-marks of various forms, of which the letters "B B H," being the initials of the original partners, always formed part, and upon settling the accounts with the executor of a deceased partner, it became necessary for him to file a bill to take the partnership accounts, and on that occasion various trade-marks used by the firm were taken into consideration by Lord *Westbury*, and he dealt with them as things of value for which the Plaintiff, as representing the share of the deceased partner, received compensation. I do not rest my judgment upon that, because that, in the absence of adverse litigants, did not amount to a formal decision, but the marks were then looked upon as things of value. Several of the trade-marks generally consist of a crown combined with the letters B B H. Now there is no doubt that a crown of itself cannot be a distinctive trade-mark. It is common to the iron trade as to almost every trade in the country. It appeared in the celebrated case of *Rodgers* v.

(1) Law Rep. 5 Ch. 155. (2) Law Rep. 17 Eq. 29.

Nowill (1). Messrs. *Rodgers & Son* always used a crown with their own name or devices of a particular character attached, and their right to the crown in these combinations was thoroughly established in that case. Then there are thirty-two trade-marks used by this firm. Most of them contain the letters B B H, that is "*Bradley, Barrows, & Hall.*" No. 2 means *Bradley, Barrows, & Hall, Bloomfield* being the name of their works. Then there is one meaning "*Bradley, Barrows, & Hall* Plating." Then in No. 6 the letters B B H are by the side of the crown instead of under it, as in No. 1. Then there is "B B H *Bloom.*," which also means the works. Then the next is "*Bloomfield*" simply, and so on in various combinations, such as "B B H *Bloomfield* extra treble best."

The *Registration of Trade Marks Act* is undoubtedly a very important one, but it has had a very short existence, having only received the Royal Assent on the 30th of August, 1875. Now in order to decide what sort of trade-marks come within the Act, I must refer to the contents of the Act itself. The first section says: "A register of trade-marks, as defined by this Act, and of the proprietors thereof, shall be established under the superintendence of the Commissioners of Patents, and from and after the 1st day of July, 1876, a person shall not be entitled to institute any proceeding to prevent the infringement of any trade-mark as defined by this Act until and unless such trade-mark is registered in pursuance of this Act." That, by the Act of 1876, is altered, so that the time for registering is extended to the 1st of July, 1877, and it is also altered in this material respect, that the fact of the registration being refused is not to be conclusive against the owner of the trade-mark, but on getting a certificate from the Registrar acting under the direction of the Commissioners of Patents that the registration has been refused, he is to be in the same situation in suing for the protection of his trade-mark as if the Act had not passed, and therefore would not be precluded, though he would certainly, in my opinion, have greater difficulties to contend with than if the trade-marks had not been registered, not only in this country, but still more in foreign countries, where registration would, I think, be reluctantly granted of trade-marks

(1) 6 Hare, 325.

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not registered in the country of the owner's domicil. Then, I think, there is nothing material in the 2nd section, which provides that trade-marks must be registered as belonging to particular goods, and classes of goods, and so forth. Then the 3rd section gives the owner of a registered trade-mark undoubtedly a very great advantage, by making the registration of a person as first proprietor of a trade-mark *primâ facie* evidence of his right to the exclusive use of such trade-mark, and after the expiration of five years from the date of such registration conclusive evidence of such right, subject to the provisions of the Act as to its connection with the good-will of a business. Therefore if a mark is once registered, five years time will give the absolute and unqualified right to it for ever. [His Lordship then read the 5th section of the Act, and continued:—] The party aggrieved means the party objecting to the registration. The Court is, by the rules made under the Act, defined to be the Chancery Division of the High Court of Justice, and the Court is armed with the most complete power of deciding whether a trade-mark shall be registered, and, if registered, whether it shall be removed from the register. Then the 6th section provides, amongst other things, that it shall not be lawful to register as part of or in combination with a trade-mark any words the exclusive use of which would not, by reason of their being calculated to deceive or otherwise, be deemed entitled to protection in a Court of Equity, or any scandalous designs. [His Lordship then read the 10th section of the Act, and continued:—] It appears that it is necessary under the rules that a person desiring to obtain a registration of a trade-mark should advertise for three months in the *Trade Marks Journal*, which, by the intention of the Legislature, is circulated amongst all trades. Trade-marks in respect of iron would therefore necessarily find their way amongst the traders in iron, and any person finding himself aggrieved by the registration of a trade-mark must have had the most ample opportunity before the Registrar of raising objections to the registration. In the present case, the advertisements have been gone through for twelve distinct marks, and the Registrar has, I think, acceded to six, and has allowed the applicants the choice of another.

By the 68th rule, the Registrar is bound to act under the

direction of the Patent Commissioners, who are the Lord Chancellor, the Master of the Rolls, and the law officers of the Crown, all of them, therefore, persons deserving the highest possible consideration, and against whose judgment, were I not left perfectly at liberty by the Act of Parliament, I should carefully hesitate to decide. But it is plain that it was never intended that the decision of the Commissioners of Patents, without hearing counsel for any party, should finally determine the right to registration. Such a doctrine as that would be, I think, inconsistent with the sections of the Act to which I have referred, and which provide that the Court is to decide all questions with reference to the right of registration and removal from the register. It was never intended that the direction of the Commissioners or the decision of the Registrar, or that of any Judge of a Court of first instance, should be conclusive, nor is even the decision of the Court of Appeal conclusive. Nothing is conclusive except the decision of the House of Lords.

Now the registration of the trade-marks B B H with a crown, B B H under the crown, B B H Bloomfield, and B B H Bloom., has been allowed. But objection is made at present to the registration of the crown with B B H under it, and a horse-shoe, B B H under the crown and the word "plating," and B B H by the side of the crown. Now, inasmuch as it is distinctly proved that all these trade-marks have been used by this firm for many years past, on what principle they should not be allowed to use them I am at a loss to understand. Mr. *Rigby* argued that they are not entitled to use any word descriptive of quality. Anything which indicates that the iron is made by this particular firm or in these particular works is not objected to; but it is said they must not add anything descriptive of quality or quantity only, and Mr. *Rigby* appeals, I must say somewhat to my surprise, to my decision in *Raggett* v. *Findlater* (1), where I decided, as I should undoubtedly decide again if I had the case before me, that the words "Nourishing Stout" could not be a trade-mark, because they were merely descriptive of quality, and not associated with any name. The case there was that the Plaintiff's stout was called "*Blockey's* Nourishing Stout." The Defendant, named *Findlater*, called his

(1) Law Rep. 17 Eq. 29.

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"*Findlater's* Nourishing Stout." If *Findlater* had described his stout as "*Blockey's* Nourishing Stout," most undoubtedly I should have stopped it, because it would have been an infringement of *Blockey's* trade-mark.

Now, in this case, if anybody were to put on their iron "Extra treble best" simply, there would be no trade-mark and no infringement of any right; but if anybody put on their iron B B H *Bloomfield* Extra Treble Best," B B H meaning *Bradley, Barrows, & Hall, Bloomfield* meaning the works, the whole combination would mean the iron of which "Extra Treble Best" is the description. Now I will take the mark which is so much objected to, namely, the one with the horse-shoe, and ask what any ordinary person would understand by it. There is *Bradley, Barrows, & Hall*, that is, B B H with the crown, their regular trade-mark, and a horse-shoe by the side of it. The horse-shoe evidently means that this iron is adapted for making horse-shoes. Why should it not be so marked? If a man who has been in the habit of dealing with them through a correspondent writes to that correspondent to send him a certain quantity of B B H iron for horse-shoes, the correspondent would look at the store and select and send that quality. Therefore that is a valuable trade-mark. Then, in the same way, a man may apply for plating iron, that is, as I understand, iron which will take tin plating, that is, iron rolled out into very thin plates, for which purpose a good quality of iron would be required. Such a man would ask for B B H iron for plating. Then the correspondent would look to the store and write for B B H plating iron. That would be the guarantee to him that he had got what he wanted. So, to take the instance of a brewer, double X indicates one strength and treble X a greater strength of beer, and any one knows that he has got the quality he wants, because there is a label marked double X or treble X, as it may be, bearing the name of the firm. The guarantee here that the customer gets the right manufacture is the letters B B H. It is the guarantee of the firm, and the mark of quality shews the particular description.

Now, if before the passing of the Act of 1875 this case had come before the Court on an application by Messrs. *Barrows & Sons* to restrain some other trader from making iron with the

mark B B H *Bloomfield* Extra Treble Best, the whole of those words would constitute the trade mark, and although Extra Treble Best by itself would be nothing, the combination of B B H *Bloomfield* Extra Treble Best becomes a trade-mark. So, in the same manner, would be B B H with the crown. The horse-shoe by itself would be nothing, but B B H with the horse-shoe has been used for many years as a trade-mark. Just so in *Raggett* v. *Findlater* (1). "*Blockey's* Nourishing Stout" is a trade-mark which *Flindlater* would have been restrained from using. Therefore I agree with Mr. *Rigby* that so far as the words claimed are descriptive of quality they cannot be trade-marks, but when they are combined with initials of the firm or the name of the works at which the iron is made, the whole combination constitutes one trade-mark.

Now, is there anything in the Act of Parliament inconsistent with this? The 10th section says: "For the purposes of this Act a trade-mark consists of one or more of the following essential particulars, that is to say, a name of an individual or firm printed, impressed, or woven in some particular and distinctive manner." Here, it is not the firm in full, but the initials, which comes to the same result—"a written signature or copy of a written signature of an individual or firm." That would be such a thing as the celebrated *Cologne* water, the trade-mark of which is "*Johann Maria Farina Eau de Cologne*—"a distinctive device, mark, heading, label, or ticket." The horse-shoe is such a device in one of them, and there are other devices in the others. "And there may be added to any one or more of the said particulars any letters, words, or figures; also"—and this is most important—"any special and distinctive word or words or combination of figures or letters used as a trade-mark before the passing of this Act may be registered as such under this Act." What, therefore, I am to inquire is, what was the trade-mark used by this firm before the passing of this Act? Because, whatever they used as a trade-mark before the passing of this Act they may have registered as a trade-mark after the Act, and my interpretation of the Act is this, that whenever there is a trade-mark which has been lawfully used, whether it consists of a single device, as the crown with the

(1) Law Rep. 17 Eq. 29.

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initials, or of a foreign word such as "Anatolia," or the Turkish word for "warranted" simply, or of a name with a device, or also of a description of quality, if the whole combination is such as would before the passing of the Act have been the proper subject of a trade-mark, and could have been protected as a trade-mark, that, in my opinion, should be registered, and can properly be registered. Therefore, in the words of the Act, "Any special and distinctive word or words or combination of figures or letters such as was used as a trade-mark before the passing of this Act may be registered as such under this Act."

Now, therefore, I am very clearly of opinion that all these descriptions of quality when combined with B B H and the crown, and the name of the works, or anything to shew that it is work made by this firm only of a particular quality, is properly the subject of a trade-mark, and therefore can properly be registered under the Act.

I hold, therefore, that every one of the four trade-marks which have been duly advertised and not registered should be registered, and I think it is a circumstance which greatly goes to fortify the view I take of the case that, though this firm, so well known, have advertised these trade-marks for three months in this public parliamentary journal, no single person has ever appeared to object to them. Therefore I am at a loss to see what possible harm can arise from it, nor can I understand why there should be so much zeal on the part of the Registrar or Commissioners of Patents to prevent the registration of that which has been a fair protection to the trade of the applicants for so many years.

I am therefore of opinion that I must accede to the application embraced in the notice of motion.

C. A. From this decision the Registrar of Patents appealed. The appeal was heard on the 26th of April.

Sir *J. Holker*, A.G., and *Rigby*, for the Appellant.

Southgate, Q.C., *Bristowe*, Q.C., and *W. P. Beale*, for Messrs. *Barrows*.

Before the opening of the appeal was concluded

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JESSEL, M.R., said:—It appears to me that the proper mode of registering the trade-mark in such a case as the present is as follows:—

Register B B H, used either alone or in combination with a crown or with a horseshoe, or with a crown and horseshoe, or with any other mark, device, or words signifying the quality of the iron.

The marks "BLOOMFIELD" and "BLOOM" would be registered in the same way.

Probably this will suit the views of both parties. If not, the matter may be mentioned again.

JAMES, L.J., and BAGGALLAY, concurred.

The case was not mentioned again.

Solicitors: *Wilson, Bristows, & Carpmael; Whately, Milward, & Whitehead.*

Ex parte SAFFERY. *In re* LAMBERT.

C. A.
1877
May 10.

Practice—Time for appealing—Bankruptcy Appeal—Rules of Court, 1875, *Order* LVII., *r.* 3—*Order* LVIII., *rr.* 2, 3, 9, 15—*Bankruptcy Rules*, 1870, *rr.* 143, 144.

An order, which was a refusal of an application, was made by the *London* Bankruptcy Court on the 10th of March. An appeal was entered with the Registrar of Appeals on the 4th of April, and on the same day notice was served on the Respondent. The Registrar's office had been entirely closed for the Easter Vacation from the 30th of March to the 3rd of April, both inclusive:—

Held, that, notwithstanding the closing of the office, the notice of appeal might have been served on the Respondent, and that, as it had not been served within twenty-one days, the appeal was too late.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Spring Rice*, sitting as Chief Judge in Bankruptcy.

The order appealed from, which was a refusal of an application made by the trustee in the liquidation, was pronounced on the

C. A. 1877 *Ex parte* SAFFERY. *In re* LAMBERT.

10th of March, 1877. The appeal was entered with the Registrar of appeals on the 4th of April, and the same day notice of the appeal was served upon the Respondents. The Registrar's office was entirely closed for the Easter Vacation from Friday the 30th of March, until Tuesday the 3rd of April, both inclusive.

Argument.

De Gex, Q.C., and *Finlay Knight*, for the trustee.

Gates, Q.C., and *Eyre*, for the Respondents, objected that the appeal was brought too late. The notice of appeal ought to have been served within twenty-one days, that is, at the latest on the 31st of March; Rules of Court, 1875, Order LVIII., rules 9, 15.

De Gex, Q.C., and *Finlay Knight*, for the trustee:—

Under rules 143, 144, of the Bankruptcy Rules, 1870, an appeal must be entered before the notice of appeal is served. And by rule 3 of Order LVII., when the time for taking a proceeding expires on a day on which the office is closed, the proceeding is in time if it is taken on the first day on which the office is next open.

[JESSEL, M.R.:—That rule only applies where "by reason of" the office being closed the proceeding cannot be taken on the proper day. The closing of the office did not prevent you from serving your notice of appeal.

BAGGALLAY, L.J.:—Does not *Ex parte Viney* (1) decide that the service of the notice is now the bringing of an appeal?]

According to the Bankruptcy Rules the entering of the appeal is the first step, and the closing of the office prevented that.

[JESSEL, M.R.:—*Ex parte Viney* shews that the entry is not now the material step. A new system has been introduced by the *Judicature Act*.]

The question in *Ex parte Viney* was, whether Sundays ought to be included in the computation of the twenty-one days. The present question is a new one, and if the Court holds that the appeal is out of time, we ask that the time may be extended.

[JAMES, L.J.:—Your opponent has a legal right to insist on the time.]

(1) 4 Ch. D. 794.

Gates, Q.C., and *Eyre*, for the Respondents, were not called upon.

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JESSEL, M.R.:—

The time for appealing is twenty-one days. The meaning of appealing is giving notice to your adversary of your intention to appeal, by serving upon him a notice of appeal. Unless that is done within the twenty-one days the appeal is too late. This appeal must be dismissed with costs.

JAMES and BAGGALLAY, L.JJ., concurred.

Solicitors for Trustee: *Stocken & Jupp.*
Solicitors for Respondents: *Fielder & Sumner.*

Ex parte MANN. *In re* KATTENGELL.

C. A. 1877 March 15.

Bill of Exchange—Proof—Loan secured by Bills accepted by Borrower and by Assignment of Debts due to him—Negotiation of Bills—Bankruptcy of Acceptor—Application of Proceeds of Assigned Debts.

Loans were made by *M.* to *K.* on the security of bills of exchange drawn by *M.* and accepted by *K.* The loans were also secured by the assignment to *M.* of debts due to *K.*, notice being given to the debtors. *M.* discounted the bills with his bankers. *K.* filed a liquidation petition, and the bankers proved in the liquidation for the full amount of the bills. The assigned debts not having been collected, it was arranged between *M.* and the trustee that the latter should collect them, and hold the proceeds without prejudice to *M.*'s rights. The debts having been collected, the trustee refused to pay over the proceeds to *M.* unless he would take up the bills:—

Held, that, in the absence of the bankers, it could not be decided whether the proof upon the bills ought to be reduced by the proceeds of the assigned debts.

But, *held*, that *M.* was not entitled to the proceeds unless he took up the bills, and that the proper order to make was that the trustee should apply the proceeds in discharging *M.*'s liability upon the bills.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Spring Rice*, acting as Chief Judge in Bankruptcy.

On the 29th of October, 1875, Messrs. *Kattengell & Campbell*, merchants in *London*, filed a liquidation petition, under which, on

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Statement.

the 31st of January, 1876, *C. L. Nichols* was appointed trustee of their estate.

The debtors had from time to time received advances by way of loan from Messrs. *H. Mann & Co.*, of *Manchester*, to secure which they had from time to time assigned to *Mann & Co.* various debts owing to them from firms abroad. They had also accepted bills of exchange drawn upon them by *Mann & Co.* for the amounts of the advances. One of the assignments was contained in a letter written by the debtors to *Mann & Co.* on the 19th of July, 1875, as follows:—

"Dear Sirs,—We have to-day received from your Mr. *Mann*, by way of loan and to help us over our to-day's payments, the bills noted at foot, the amount of which, together with the £600 lent us on the 14th inst., we undertake to return to you in cash at latest, on the arrival of the mail due at the end of the present month. Meantime, to keep you out of cash advance, we will accept your drafts at five months from the 20th inst. for the amount of the above loan and commission, viz., £2228 13*s.* 4*d.* And as collateral security we hereby assign and hypothecate to you the debts due to us by our correspondents, as follows:—

Señor *Manuel Ruiz Lara & Co.*, of *Guatemala*, amounting to about	£1130
Doña *Rosario Vivas*, of *Granada, Nicaragua*, amounting to about	531
Señores *J. & D. Lacayo*, of *Granada, Nicaragua*, amounting to about	615
Señor *Don Leon Avila*, of *San Miguel, Salvador*, amounting to about	821

And we hereby authorize you to use our names for the collection of the said debts, and appoint you our attorneys for that purpose; and we also undertake to hold for your account, and to hand over to you, any remittances on account of the said debts, should any come to hand. This hypothecation is intended to secure, not only the moneys the subject of this security, but also all other moneys from time to time due from ourselves to yourselves, and to secure all other hypothecations now or at any time hereafter made by ourselves in favour of yourselves, and all such hypothecations are

to be held, not only as security for the specific debt or debts in respect of which they may have been made, but also as security for the sums the subject of the present security, and all other moneys from time to time due from ourselves to you.

"We are, dear Sirs,

"Yours faithfully,

(Signed) "*Kattengell & Campbell.*"

A schedule to this letter specified as received from Mr. *H. Mann* two bills, respectively for £800 and £774 19*s.*, drawn by *Mann & Co.* on *F. G. Horne.*

The other assignments were in a similar form. *Mann & Co.* gave notice of the assignments to the firms from whom the assigned debts were due.

At the commencement of the liquidation there were in the hands of the *Manchester and Salford Banking Company* thirteen bills of exchange, for sums amounting altogether to more than £9000, drawn by *Mann & Co.* upon *Kattengell & Campbell* and accepted by them. These bills had been drawn in respect of the advances made by *Mann & Co.* to *Kattengell & Campbell*, and the bank had discounted them for *Mann & Co.* *Mann & Co.* did not take up these bills, and the bank proved for the full amount of them in the liquidation. It was arranged between *Mann & Co.* and the trustee that the trustee should collect the hypothecated debts, and should hold the proceeds of collection without prejudice to any rights of *Mann & Co.* In pursuance of this arrangement the trustee collected various sums of money, which *Mann & Co.* then claimed to have paid over to them. The trustee refused to pay the moneys to them unless they would take up the bills upon which the bank had proved. *Mann* then applied to the Court for an order that the trustee should account to them for, and pay over to them, all moneys received by him from any or either of the firms named in the notice of motion (including the firms mentioned in the letter of the 19th of July, 1875) on account of the hypothecated debts. The Registrar ordered that an account should be taken of what was due to *Mann & Co.* from the debtors (after deducting the amount of the bills given for the debt, or any part thereof, which had been discounted by *Mann & Co.*), and that, if on taking the account it should appear that there was

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anything due to *Mann & Co.*, the trustee should apply the proceeds of the hypothecated debts in payment of the amount, and should then apply the balance in discharging *Mann & Co.'s* liability under the bills of exchange. And it was ordered that, if there should be any surplus in the hands of the trustee, the same was to be retained by him for the benefit of the estate generally.

From this order *Mann & Co.* appealed.

Argument.

Roxburgh, Q.C., *Ambrose*, Q.C., and *T. N. Hilbery*, for the Appellant :—

The Appellants are liable to the bank upon the bills, and are entitled to the proceeds of their security to enable them to discharge that liability. The effect of the Registrar's order will be to reduce the amount of the proof on the bills against the acceptor's estate. He has applied the principle of *Ex parte Waring* (1), where there is only one insolvency. That principle applies only where there is a double insolvency: *Ex parte General South American Company* (2).

[MELLISH, L.J.—Are you entitled to put the money produced by the security into your pocket until you have paid or taken up the bills? There is no debt due to you now from the acceptors. You have been paid by means of the discount.]

A mortgage given to secure a debt is not destroyed by taking the debtor under a *ca. sa.*

[MELLISH, L.J. :—You could not take him if you had discounted the bill on which he was liable.]

The remedy would be suspended during the pendency of the bill, but it would revive if the bill was outstanding and unpaid. The holders of the bills have no right to the security.

[MELLISH, L.J. :—If you take up the bills you are clearly entitled to the money.

JAMES, L.J. :—Surely your right is only to have the money applied in taking up the bills.

MELLISH, L.J. :—If you were the holders of the bills you could not prove on them without deducting the value of your security.

(1) 19 Ves. 345. (2) Law Rep. 10 Ch. 635.

Are you entitled to stand in any better position because you have discounted them?]

Argument.

If there had been no bankruptcy, and the holders of the bills had sued *Kattengell & Campbell*, how could they have made the security available in that action? They must discharge their primary liability on the bills. The bankruptcy cannot alter their position.

[MELLISH, L.J.:—I do not think the Registrar's order decides anything as to the real question, viz., whether you are entitled to the benefit of the bank's proof and also to your security. We cannot, in the absence of the bill-holders, decide whether the proof ought to be reduced by the value of the security.]

If we had collected the debts ourselves, as we were entitled to do, how could the trustee have taken our security from us? He has received the money by an arrangement which was expressly made without prejudice to our rights.

De Gex, Q.C., *Romer*, and *F. W. Hollams*, for the trustee, were not called upon.

Judgment.

JAMES, L.J.:—

I think that the Registrar's order is quite right. The Appellants have no right to have the money placed in their custody while it is quite uncertain whether they will pay the bills or not. There may be a debt due to *Mann & Co.* independently of the bills, and the Registrar has taken care to provide for its payment, and after that is paid it is quite right that the money should be applied, as the order directs, in discharging *Mann & Co.'s* liability upon the bills. We have nothing to do with the consequences of the order.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors for Appellants: *F. W. & H. Hilbery.*
Solicitors for trustee: *Hollams, Son, & Coward.*

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March 22.

Ex parte BLAKEMORE. *In re* BLAKEMORE.

Proof in Bankruptcy—Provable Debt—Liability capable of being fairly estimated—Annuity during Widowhood—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 31.

13 C.L.D. 264
14 C.L.D. 587

A widow was entitled under the will of her husband to an annuity during her life or widowhood, and it was charged upon property bequeathed by him to his sons, and was further secured by the joint and several bond of the sons. The sons filed a liquidation petition:—

Held, that the value of the contingency of the widow's marrying again was capable of being fairly estimated, and that proof must be admitted for the value of the future payments as ascertained by an actuary.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Murray*, sitting as Chief Judge in Bankruptcy.

John Blakemore, an upholsterer at *Leamington*, by his will, dated the 1st of February, 1868, bequeathed to his wife, *Maria Blakemore*, and his eldest son, *John Blakemore*, all his stock-in-trade, trade fixtures, and tools, and all book debts which should be employed by him in his business, upon trust, after payment of all his debts (except mortgage debts), and funeral expenses, and a legacy of £20 to his wife, to carry on his business until his youngest son, *Alfred Blakemore*, should have attained the age of twenty-one, or should have died, and the legacies thereinafter bequeathed to his daughters should be fully paid. And, when those events had happened, the testator directed that his business, and the capital and stock engaged therein, should go and belong to, and he thereby bequeathed the same to, his two sons in equal shares, in the hope they might continue to carry on the same as partners, if both should then be living, but, if only one should then be living, then he bequeathed the same to such one only; but in either case subject and charged nevertheless with the payment to his wife during her life and widowhood of the annual sum of £80. And in order the better to secure the payment thereof, the testator thereby directed that, before his sons or son should be entitled to the benefit of the bequest, they (or such one of them as should so become entitled thereto) should make and execute the joint and several or the sole bond (as the case might be) of such sons

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or son, in a sufficient penal sum for securing the payment of the annuity, and should deliver the bond to his wife. The testator died on the 23rd of August, 1868. The son *Alfred* attained twenty-one on the 9th of July, 1870, and after that the business was carried on by the two sons in partnership. On the 8th of January, 1874, they executed a joint and several bond to the widow to secure the annuity. In July, 1876, they filed a liquidation petition, under which *E. C. Foreman* was appointed trustee. The widow, on the 22nd of December, 1876, tendered a proof in the liquidation for £200, being two and a half years' arrears of the annuity up to the day of filing of the petition, and for £13 interest on the arrears, and for the further sum of £657, being the value of the annuity for the widow's life, according to the table fixed by the *Succession Duty Act*, 1853, she having been at the date of the filing of the petition in her 65th year. The trustee admitted the proof for the £213, but rejected it as to the £657, on the ground that that amount was in respect of an annuity terminable upon a contingency not capable of valuation. The Registrar affirmed the decision of the trustee. The widow appealed.

Statement.

Winslow, Q.C., and *Finlay Knight*, for the Appellant:—

Argument.

There having been a breach of the condition of the bond, proof would have been admitted even under the old law: *Ex parte Rowlatt* (1); *Ex parte Marshall* (2); *Ex parte Thistlewood* (3). But, at any rate, sect. 31 of the Act of 1869 meets the case. The value of the contingency is not incapable of being fairly estimated: *Ex parte Waters* (4); *Brett* v. *Jackson* (5); *Ex parte Jackson* (6); *Ex parte Naden* (7); *Ex parte Llynvi Coal and Iron Company* (8). In *Ex parte Parratt* (9), a case under the old law, an annuity payable while a person continued to superintend saltworks, which might be discontinued by reason of the brine ceasing to flow or by reason of the forfeiture of the lease of the brine pits, was held to be capable of valuation. The Registrar founded his decision upon *Ex parte Davis* (10), but that was merely a decision that the

(1) 2 Rose, 416.
(2) 1 Mont. & A. 118, 145.
(3) 19 Ves. 236, 245.
(4) Law Rep. 8 Ch. 562.
(5) Ibid. 4 C. P. 259.
(6) 20 W. R. 1023.
(7) Law Rep. 9 Ch. 670.
(8) Ibid. 7 Ch. 28, 31.
(9) 2 Mont. & A. 626.
(10) Mont. 297.

C. A. 1877 *Ex parte* BLAKEMORE *In re* BLAKEMORE. Argument.

words of sect. 56 of 6 Geo. 4, c. 16, did not apply. The onus is on the trustee to shew that the Appellant's proof ought to be reduced by reason of the contingency of her marrying again.

Roxburgh, Q.C., and *Romer*, for the trustee :—

The value of the contingency is not capable of judicial determination: *Mudge* v. *Rowan* (1).

[MELLISH, L.J. :—Is the proportion of the number of widows aged sixty-five who marry again to the whole number of widows of that age such that the contingency can make any difference in the value of the annuity? I should think it would be an exaggeration to say that the proportion is one to ten.]

There is no means of ascertaining that proportion. The contingency cannot be valued by means of an average as the expectation of life at a given age can. There are no tables founded on experience.

[MELLISH, L.J. :—In order to justify us under sect. 31 in rejecting the proof, we must find expressly that the value of the contingency is incapable of being fairly estimated.]

Ex parte Davis (2) shews that it is. The case of this particular widow must be looked at; the Court cannot decide by an average. When sect. 31 says that "liability" shall include anything which as to mode of valuation is assessable only as matter of opinion, it does not mean mere guess-work.

Judgment.

JAMES, L.J. :—

I am of opinion that we cannot judicially declare that this contingency is incapable of being fairly estimated. Like every other contingency affecting human life or human conduct, it is, I think, capable of estimation. No doubt it is uncertain whether the Appellant will marry again, just as the duration of any particular life is uncertain. But, though the duration of a particular life is uncertain, the expectation of life at a given age is reduced to a certainty when you have regard to a million of lives. The value of the expectation of life is arrived at by an average deduced from practical experience. The intention of the Act was to get rid of

(1) Law Rep. 3 Ex. 85. (2) Mont. 297.

C. A. 1877 *Ex parte* BLAKEMORE *In re* BLAKEMORE.

the difficulties which had arisen in former cases, in which very great hardship had been inflicted both upon creditors who were deprived of any share of the bankrupt's assets, and upon the bankrupt, who remained liable to the creditors' claims. I think that sect. 31 was intended to apply to all cases of this kind, and pre-eminently to the case of an annuity determinable on a contingency. We cannot say that the contingency is incapable of valuation.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

It was then arranged that it should be referred to an actuary to ascertain the value of the annuity as a simple life annuity, and to deduct from that value such a sum as he should estimate to be the proper deduction for the contingency. The valuation to be made as at the commencement of the liquidation. Proof was to be admitted for the value thus ascertained.

Solicitors for Appellant: *Field, Roscoe, & Co.*, agents for *A. S. Field & Son, Leamington.*

Solicitors for Trustee: *Lawrance, Plews, & Co.*

Ex parte SIMS. *In re* GRUBB.

C. A. 1877 March 22.

Execution against Trader for Sum exceeding £50—Expenses of Execution—Possession Money—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 87.

In ascertaining whether, under sect. 87 of the *Bankruptcy Act*, 1869, an execution against a trader is for a sum exceeding £50, all the expenses which the sheriff is entitled to charge at the time of the sale of the goods are to be included.

Therefore, possession money may be included where the sheriff has been compelled to take possession.

Decision of *Bacon*, C.J., affirmed.

Statement.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy. The following is a short summary of the facts, which are fully reported (1) :—

Execution had been, on the 14th of September, levied on the goods of *E. T. Grubb*, a trader, for a judgment debt, which, with

(1) 4 Ch. D. 521.

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interest, costs of execution, sheriff's poundage, and officer's fee, amounted to £49 18*s.* 6*d.* If possession money for one day (at the rate of 5*s.* per diem) was included, the amount for which the levy was to be made was £50 3*s.* 6*d.* On the 18th of September *Grubb* filed a liquidation petition. The Chief Judge, affirming the decision of the County Court Judge, held that at least one day's possession money must be included, and that the trustee in the liquidation was, under sect. 87 of the *Bankruptcy Act*, 1869, entitled to the proceeds of the sale of the goods. The execution creditors appealed.

Argument.

Francis, for the Appellants:—

Ex parte Liverpool Loan Company (1) shews that the costs of execution are to be added to the debt. But those costs are ascertained at the time when the seizure is made, and nothing which is not certain and defined at that moment ought to be included: *Howes* v. *Young* (2). The amount for which the execution is levied cannot be allowed to fluctuate at the will of the debtor or the trustee, so as to defeat the execution creditor.

[Mellish, L.J.:—The sheriff is liable to the execution creditor if he does not sell at once.]

He can only wait a reasonable time. There may be no right to possession money at all: *Masters* v. *Lowther* (3).

[Mellish, L.J.:—If the goods sold for less than the amount of the debt, would the sheriff be entitled to poundage on the full amount of the debt?]

No, only upon the sum realized.

[James, L.J.:—Then there is something which is uncertain at the time of the seizure.]

E. C. Willis, for the trustee, was not called upon.

Judgment, James, L.J.

James, L.J.:—

It is impossible that we can differ from the two decisions of the County Court Judge and the Chief Judge, which followed the previous decision of this Court in *Ex parte Liverpool Loan Com-*

(1) Law Rep. 7 Ch. 732. (2) 1 Ex. D. 146.
(3) 11 C. B. 948.

pany (1), that the £50 includes, at all events, certain costs and expenses. The indorsement on the writ directs the levy to be made for the debt, costs of execution, interest on the debt, sheriffs' poundage, officer's fees, costs of levying, and other legal incidental expenses. There are other legal incidental expenses besides those which are specifically mentioned, and I do not know to what the words can so well apply as to possession money. The sum for which the goods could be redeemed at the time of sale is that to which we must look.

Judgment, James, L.J.

MELLISH, L.J.:— Mellish, L.J.

I am of the same opinion. When sect. 87 had first to be construed it was a matter of considerable doubt whether the £50 ought to be confined to the judgment debt and interest, or whether it should include any of the legal expenses incidental to the execution. And, upon consideration, we held that certain expenses of the execution ought to be included; and that being so, I think we must now hold that all the legal incidental expenses should be included. The section provides that where the goods of a trader have been taken in execution in respect of a judgment for a sum exceeding £50, and sold, the sheriff is to retain the proceeds of sale for fourteen days; and if within that time he has notice of a bankruptcy petition having been presented against the trader, he is to hold the proceeds of sale, after deducting expenses, on trust to pay the same to the trustee. The test, I think, is, what are the expenses at the time when the goods are sold, what is the amount which can be levied then, and possession money is as much a charge for which the levy can then be made as any of the other expenses. I think we must hold that all the expenses are to be included.

BAGGALLAY, J.A.:— Baggallay, J.A.

I am of the same opinion.

Solicitors for Appellants: *Dod & Longstaffe.*

Solicitors for Trustee: *Duignan & Smiles*, agents for *F. & H. Corbett, Worcester.*

(1) Law Rep. 7 Ch. 732.

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May 9.

NOBLE *v.* EDWARDES.

[1876 N. 40.]

EDWARDES *v.* NOBLE.

[1875 E. 84.]

Rescission of Agreement relating to Land—Action for Damages for Breach of Contract for Sale of Land—Measure of Damages—Re-sale by the Vendor—Time of the Essence of the Contract—Sale by Trustees—Proper Valuation of Property.

9 Ch D. 621.
12 Ch D. 70

By a contract in writing, dated the 3rd of September, 1873, *E.* agreed to purchase certain freehold farms from *N.* for £33,000, subject to the title being accepted by his solicitor. The purchase-money was to be paid on the 29th of September, 1873, on which day it was presumed that the contract would be completed and possession given; but in the event of the purchase not being completed on that day, the purchaser was to pay interest up to such reasonable time as might be agreed upon by his solicitor. When the title was produced it appeared that *N.* was not the legal owner of the land, but had agreed to purchase the same from the trustees of a settlement for £21,000, by a contract which was not completed till after the 29th of September, 1873. *E.* took the objection that it appeared on the face of the title that the trustees had sold the estate to *N.* for a grossly inadequate price. *N.* proved that the trustees had had a fair valuation made of the land before offering it to him, but, notwithstanding, on the 29th of September, *E.* wrote to *N.* stating that he considered the objection fatal, and that he rescinded the contract. *N.* then obtained a conveyance from the trustees, and re-sold the estate for £25,000 to a stranger, and in August, 1875, brought an action against *E.* to recover the difference of price by way of damages for breach of the contract. *E.* filed a bill against *N.* to restrain the action, and to obtain a declaration that the contract was rescinded:—

Held, by *Bacon*, V.C., first, that the bill to obtain a declaration of the rescission of the contract could not be maintained, and that *E.*'s bill must therefore be dismissed:

Secondly, that the apparently inadequate price at which the estate was sold by the trustees was not a fatal objection to the title, and, therefore, that *E.* had no right to rescind the contract:

Thirdly, that *N.* had a right to re-sell the estate and claim the difference by way of damages against *E.*, there being no distinction in this respect between a sale of chattels and of land.

Held, on appeal (the objection not having been urged in the Court below), that, on the construction of the agreement, it was to be completed on the 29th of September, 1873, and that, the action having been commenced

before the *Judicature Act* came into operation, time was of the essence of the contract; and that, the vendor not being on that day in a position to make a good title and execute a conveyance, he could not sustain an action for damages.

IN August, 1873, the Plaintiff, *C. Noble*, entered into a contract to purchase for £21,000 from the trustees of the marriage settlement of a Mr. *Younge* three farms in *Hampshire*, comprising about 1020 acres. About the same time he entered into negotiations with the Defendant, *T. D. Edwardes*, to sell him these farms for £33,000, and on the 3rd of September, 1873, a contract was entered into in a letter written by *Edwardes* to *Noble* as follows:—

"Provided the title is accepted by my solicitor, Mr. *Watson*, I agree to purchase the freehold estate called the *Dudley, Bradley and Henley Farms*, containing 1020 acres, or thereabouts, at the price of £33,000, to be paid as follows: say, first, to pay a deposit of £2000 to be placed in the *London and County Bank, Kensington*, in our joint names, on or before the 12th instant; but in the event of the estate not being let before the 29th of September, or the title not approved of then, by due notice from my solicitor, the deposit is to be returned and paid to my credit at the same bank; secondly, the balance of £31,000 I agree to pay on the 29th of September, the day on which it is presumed this purchase will be completed, and possession given; but in the event of it not being completed at the date agreed to I am willing to pay interest on said £31,000, after the rate of $3\frac{1}{2}$ per cent. per annum, up to such reasonable time as may be agreed to by my solicitor."

In the course of the negotiation, and as an inducement to make this purchase, *Edwardes* had been told by *Noble* that he would find a substantial tenant for the farms who would be willing to pay a rent of £1100 a year; and during this time *Edwardes* was in treaty, with the privity of *Noble*, with *W. J. Goulton* to grant him a lease of the farms from the 29th of September, 1873. On the 30th of August, 1873, *Goulton* wrote to *Noble*, enclosing a memorandum by which he proposed to take the farms for a term of fourteen or twenty-one years at a yearly rent of £1100.

On the 3rd of September, 1873, after concluding his agreement for purchase, *Noble* wrote to *Goulton* accepting him as his tenant.

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At the foot of this letter was a memorandum by *Edwardes* to the effect that if the title to the estate was accepted by his (*Edwardes'*) solicitors, he agreed to accept *Goulton* as his tenant.

At the time of entering into the agreement of the 3rd of September, 1873, the property in question had not been actually conveyed to *Noble* though he was then under a contract to purchase it for £21,000.

An abstract of *Noble's* title to the farms was shortly afterwards delivered to *Edwardes'* solicitor. On the 29th of Septemher, 1873, *Edwardes'* solicitor sent to *Noble's* solicitor a statement of his objections to the title, and informed him that by reason of the defects specified in the objections the purchase by *Edwardes* must go off. The chief objections were—

(1.) That the sale to *Noble*, the vendor, was invalid, because it appeared that the vendors to him (who were trustees of Mr. *Younge's* marriage settlement) were only to receive £20,000 of the purchase-money, and that the other £1000 was to go to *Thomas Hooper*, the present lessee of the farms, for the relinquishment of his interests, in order that *Noble* might at once have vacant possession; and consequently that the trustees ought not to have sold for less than £21,000.

(2.) That the price for which the trustees sold the estate was grossly inadequate, as appeared from the disparity between £33,000, the present price, and £20,000, the price paid by *Noble*.

The attention of the trustees being drawn to these objections, it was arranged that the whole purchase-money should be received by them, and the £1000 for the interest of *Hooper*, the lessee, should be provided by Mr. *Younge*.

As to the inadequacy of price, evidence was adduced that the trustees had taken the opinion of two competent surveyors, who had each fixed from £19,000 to £20,000 as the value; and that, upon hearing of the sale to *Noble*, they had sent eminent *London* surveyors to re-value the property, and that their opinions coincided with the previous valuations.

Noble, having only purchased the farms as a speculation in order to resell them, and being also pressed by his vendor to complete, on finding that *Edwardes* refused to complete, proceeded to offer the farms again for sale. On the 6th of May, 1874, he gave

Edwardes formal notice that he had been offered £25,000 for the farms, and that he should accept such offer at the end of one week from the date of the notice, and forthwith sell and convey the farms to the purchaser for £25,000 ; and that, upon the completion of such sale, he should hold *Edwardes* liable for the difference between £25,000 to be received and the £33,000, the price contracted to be paid by *Edwardes*, and that he should take such legal steps to recover such difference in price as he might be advised, with interest, damages, and costs. The sale for £25,000 was subsequently completed, and notice of it was duly sent to *Edwardes*.

In addition to the difference between the £25,000 and the £33,000, *Noble*, as it appeared, had been put to heavy expenses in raising the money to complete his own purchase from *Younge's* trustees, and in carrying out his agreement with them, and with the purchase from himself.

On the 20th of August, 1875, *Noble* commenced an action against *Edwardes* in the Court of Exchequer, claiming £10,000 for damages sustained by reason of *Edwardes* having refused to perform his contract.

On the 9th of September, 1875, *Edwardes* filed a bill against *Noble* praying a declaration that he was entitled to rescind the agreement of the 3rd of September, 1873, and an injunction to restrain prosecution of the action for damages.

On the 12th of February, 1876, on an objection by the Defendant *Noble* that under the *Judicature Act*, 1873, s. 24, sub-s. 5, no cause or proceeding pending after the 1st of November, 1875, in the High Court of Justice could be restrained by injunction, the cause of *Edwardes* v. *Noble* was directed to stand over until the trial in the Exchequer Division of *Noble* v. *Edwardes*.

On the 25th of March, 1876, the action of *Noble* v. *Edwardes* was transferred to the Chancery Division of the High Court, and the action and the bill were afterwards ordered to come on for trial together.

Edwardes insisted, by his defence and evidence, on his right to rescind, and alleged that since the exercise of his alleged right to rescind he had discovered that the rent of £1100, on the basis of which he had been induced to enter into the agreement, was not

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bonâ fide, but a fictitious rent, and that the farms were not, and never could be, worth such a rent.

It appeared from the evidence that at the date of the agreement the farms were in a very bad state of cultivation, and in the occupation of a tenant who had been there for a long time, and held them at a yearly rent of £450 only.

Edwardes himself had been down to inspect the farms, and it appeared that the offer of *Goulton*, who was at the time a man of substantial means, to give a rent of £1100 a year for the farms, was *bonâ fide*.

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Since then *Goulton* had become bankrupt, but that was explained by him in his evidence in Court to have arisen from his having become surety for the debt of another, and not from any liabilities of his own, all of which he was able to satisfy in full.

The action and bill came on for hearing together, before Vice-Chancellor *Bacon*, on the 14th of February, 1877.

Argument.

Kay, Q.C., and *Herbert Smith*, for *Noble*:—

The action by *Noble* is simply an action for damages. The Defendant had no ground for rescinding the contract, and his attempt to do so was never accepted by *Noble*. There is no pretence for saying that time was of the essence of the contract: *Boehm* v. *Wood* (1). As to the objections made to the title, the objection as to the improper application of the purchase-money was met by the tenant for life paying the £1000 and the trustees receiving the whole of the purchase-money; and with respect to the objection that the trustees have sold at a grossly inadequate price, the evidence shews that they took every precaution to ascertain the true value before they sold it; but *Edwardes*, having heard of the price that *Noble* gave for the land, determined to get rid of the bargain. There is no evidence of fraud here, nor is it distinctly pleaded, as it ought to have been, if it was intended to be relied on. There is, therefore, no case shewn for setting aside the sale on the ground of the sale by the trustees: *Harper* v. *Hayes* (2); *Stevens* v. *Austin* (3). Then, as to the measure of damages to which *Noble* is entitled, he was justified in re-selling

(1) 1 Jac. & W. 419. (2) 2 D. F. & J. 542.
(3) 7 Jur. (N.S.) 873.

the land when *Edwardes* refused to complete, and the measure of damages is the difference between the contract price and the price for which he was able to re-sell the property on the earliest convenient day. There is no difference between contracts for sale of land and chattels in this respect: *Stewart* v. *Cauty* (1); *Pott* v. *Flather* (2); *Laird* v. *Pim* (3); *Mayne* on Damages (4).

With respect to the bill in *Edwardes* v. *Noble*, we claim to have it dismissed on the ground that no bill for the rescission of a written contract for the sale of land is maintainable: *Onions* v. *Cohen* (5).

Sir *H. Jackson*, Q.C., and *Morshead*, for *Edwardes*:—

Edwardes was justified in rescinding the contract and in resisting the Plaintiff's claim for damages. In the absence of the usual condition that if the purchaser fail to comply with the conditions the owner shall be at liberty to re-sell the estate and to recover the deficiency, if any, by such re-sale, together with all charges, from the defaulter, the Plaintiff was not entitled to re-sell the property and claim the difference: *Sugden's* Vendors and Purchasers (6); *Davidson's* Conveyancing (7). And as the contract contained in the letters contained no such condition, the Plaintiff's remedy was by bill for specific performance. It is well settled that no damages can be recovered for default of a contract to purchase real estate. There is a distinction between a contract to sell a chattel, where the vendor must be taken to know what his right to the chattel is, and a contract to sell real estate, the title to which must always be matter of some uncertainty. In the latter case neither the proposing purchaser nor the vendor could recover damages for the loss of their bargain: *Bain* v. *Fothergill* (8). The original contract being bad from the defects in the title, it cannot be mended by subsequent acts of the trustees, and is not a contract of which specific performance would be decreed: *Rede* v. *Oakes* (9).

Without laying any stress on the first objection to the title, the

(1) 8 M. & W. 160.
(2) 11 Jur. 735.
(3) 7 M. & W. 474.
(4) Page 140.
(5) 2 H. & M. 354.
(6) Page 39.
(7) 4th Ed. vol. i. p. 568.
(8) Law Rep. 7 H. L. 158.
(9) 4 D. J. & S. 505.

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second, namely, the difference in price between the almost contemporaneous sales by the trustees to *Noble* for £21,000, and by *Noble* to *Edwardes* for £33,000, would have been a serious blot on the title, as being based upon a sale of trust property at an undervalue. If the sale for £21,000 was proper and for a sufficient price, then the rental of £1100 proposed to be given by *Goulton* must have been fictitious. If the property was worth a letting value of £1100 a year, then the sale by trustees for £21,000 could not be supported, and specific performance could not have been decreed against them of a contract which, from its gross inadequacy of consideration, would amount to a breach of trust, and a purchaser would have been left to his remedy at law: *Mortlock* v. *Buller* (1); *Bridger* v. *Rice* (2); *Ord* v. *Noel* (3).

Kay, in reply.

Judgment, V.-C. B. —

BACON, V.C.:—

With regard to the suit (*Edwardes* v. *Noble*) I shall not trouble you, Mr. *Kay*. That must be removed, not only for the reasons which have been urged, but also to make clear that which I have to decide. The bill is altogether wrong. The action being pending, there was no topic of defence that could be urged by the Defendant that might not have been, and must not be, tried and decided in that pending action. The bill was therefore wholly useless and wholly unjustifiable. All that it proposes is a declaration that the Plaintiff in that suit was entitled to have the contract rescinded. If he is entitled to have the contract rescinded, that was the defence which he could plead at law in the then pending suit. But the case before me depends entirely upon what would have been a common law action—the statement of claim and the statement of defence, upon which the judgment of the Court can alone be based. Now the case, in its elements and in its nature, is very simple. Two men enter into a contract, and one of them breaks it. The other one is entitled to claim damages and recover them if he can. That is this case, and nothing else. It is a contract to buy an estate. There can be no difference, that

(1) 10 Ves. 292. (2) 1 Jac. & W. 74.
(3) 5 Madd. 438.

I know of, which will distinguish the subject of the contract, so as to apply a different law to it. It was argued that the law relating to contracts for land differed in its nature from contracts for bales of goods. I cannot follow that distinction. At common law, when common law alone prevailed, a man who complained that a contract had been broken by his adversary was entitled to take that case to a jury and have it tried. That right has not been in any way abridged by the change in the law; and that is the position in which this case is presented to me, and the facts of the agreement are all clear enough. Two remedies, at least, were open to the Plaintiff. He might have filed a bill for specific performance of the contract, and he might have gone into a troublesome and expensive litigation in a suit so framed. He might have had a reference to Chambers as to title, and years might have elapsed before, if he was right, he could procure a decree or a final order that would do him justice. But there was another remedy which he had, plainly enough. He could say, "You have entered into a contract with me, and you have broken it, and I am damaged." He preferred that shorter, and perhaps much more satisfactory, course, and filed his statement of claim, by which, stating shortly, but clearly and fully enough, the transactions between the parties out of which the claim arose, he sought to recover damages amounting to £10,000. In that claim is stated the original contract, and the refusal of the Defendant to perform that contract, and the notice to the Defendant of the offer of £25,000 for the farms, that he would accept such offer at the end of one week from the date of the notice, and that upon the completion of the sale for £25,000 he would hold the Defendant liable for the difference between the £25,000 and the £33,000 contracted to be paid by the Defendant. That was a notice which the Defendant was advised to pay no attention to. Having the choice of two remedies, and resorting to that which was equally legal, and, as he thought, more convenient, the Plaintiff brings his action claiming damages in respect of the £8000 which he had lost on the estate, and other expenses which he had been put to, his claim amounting in all to £10,000. That is the case that the Plaintiff presents, and, indeed, that is the only action I have anything to do with. The defence is shortly this: The Defendant

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says that the agreement was that the Plaintiff should make him a perfect title; that he had not done so; and that the defects in the Plaintiff's title were such as could not be cured. On the 29th of September, 1873, he forwarded to the Plaintiff's solicitor a statement of his objections, and informed him, that by reason of the defects specified in such objection the purchase must go off. That is the rescission. Then, having the abstract before him, having prepared the requisitions, having the advantage of counsel's opinion, he then and there makes up his mind that those objections are in his judgment so formidable, so fatal to the title, that he at once determines he will not complete; and he filed his bill, asking a declaration that he was entitled on that day and by that means, for the reasons there stated, to rescind the contract. He goes on further to say, that he became entitled to put an end to, and did in fact effectually put an end to and rescind his agreement to purchase the farms, and that it was by reason of his right so to rescind it, and not otherwise in breach of the agreement, that he declined and refused to perform it, bringing it, therefore, to the plain point whether, on the 29th of September, or on any other day before the notice was given to him, he had, upon the facts proved in the case, a right to rescind, for that he did rescind he asserts. He also denies his liability to pay the £8000 upon the resale of the farms. And thus, so far, the statement of defence rests simply upon the Defendant's alleged right to rescind the contract. No time was given to the Plaintiff to remedy defects, if any defects there were. There is no evidence of any further discussion, or that any act, or anything else, could remove those objections which the Defendant said were fatal to the title; and from that time he does nothing, except file the bill.

An additional circumstance was introduced into the defence, which was, that since rescinding the agreement, the Defendant had discovered that the rent of £1100, on the basis of which he was induced by the Plaintiff to enter into the agreement, was not a *bonâ fide*, but a fictitious, rent. It has been argued, and very justly, that if the meaning of this paragraph was to impute a fraud to the Plaintiff in alleging that £1100 a year could be obtained for this property—if it was a swindle or snare, or to be called by any other name—it ought to have been stated, and there

ought to have been the means of meeting that for the ends of justice. The paragraph goes on to say that the farms were not worth the rent, and the rent cannot be obtained, and therefore the claim for damages is wholly unfounded. Now, the state of the facts seems to me as simple, as plain, and as free from doubt or difficulty as in any case that was ever presented. [His Lordship then stated the facts, observing that it could not be said that there was any surprise, or any catching bargain, or any attempt on the part of Mr. *Noble* to avail himself of any fancy that Mr. *Edwardes* had conceived of holding this property.]

Some time before the 3rd of September, the agreement between *Noble* and *Goulton* for *Goulton's* tenancy—a most explicit and distinct agreement, and by no means a short or careless or ill-prepared instrument—is put into the hands of *Edwardes*, for on the 3rd of September, *Noble*, with whom *Goulton's* contract had been originally made, signs the memorandum that he accepts him as a tenant on the terms of this document. And *Edwardes* writes on the same sheet of paper, "On the title to the estate being accepted by my solicitor, Mr. *Watson*, I agree to accept Mr. *Goulton* as my tenant." Can anything be more distinct and business-like than such a transaction? It is not alleged anywhere, either in the pleadings, in the evidence, or in argument, that there was any misrepresentation or surprise practised upon *Edwardes*. Nothing could be more open and straightforward than the whole of the dealings; and on the 3rd of September, the agreement, which both parties agree is a binding contract between them, is entered into; the statements only differing in this, that *Noble* says, after (that is, some time shortly after) the contract was executed, he informed *Edwardes* for the first time that he had bought for £21,000 that which he had sold for £33,000; and *Edwardes*, as his evidence shews, before rescinding the contract, knew that fact. One cannot help seeing that it has a certain bearing upon the matter in discussion, because I cannot help thinking that it had a great deal to do with *Edwardes'* desire to get out of his bargain. It was a plain and distinct bargain, and, in my opinion, a perfectly binding contract, and I have not heard a word to lead me to think it was not.

As to the grounds upon which the rescission took place, all those

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points upon which the Defendant could have successfully defended himself at law, if there had been no *Judicature Act*, are open to him. First, it is said there was no stipulation in the written agreement that the Plaintiff should be at liberty to sell if the contract was rescinded. For that purpose a passage in Lord *St. Leonards'* Vendors and Purchasers (1) is referred to, which is well enough known, that book having been written for the guidance of practitioners and containing a digest of the law upon the subject. In that passage Lord *St. Leonards* cautions and advises persons who are preparing contracts for sale to insert such a provision, but he nowhere says that the right does not exist if it is not inserted. It is very convenient that the right should be expressed in the terms of the contract, but without any such expression the law implies such a contract and provides the remedy for the breach of it. The other authority referred to, namely, *Davidson's* Conveyancing (2), means just the same thing, and no more; and unless it can be shewn that there is no right to recover damages for the breach of this contract, which does not state that there shall be no right to resell, I am prepared to hold that such common law right, which is of universal practice, and in the city of *London* acted upon every day, is a right which a Plaintiff complaining of a breach of contract may at any time exercise. What else is he to do? Is the only remedy provided for him a bill for specific performance? No one can say that; and if the contract has been broken and damage has been sustained, no one can say that there is no right to bring an action. That there has been a breach of contract here, and that there has been, to a certain extent, plain damage, are facts not in controversy. The rescission is insisted upon and alleged by the Defendant. It is acted upon by the Plaintiff, and the difference between the £25,000 and £33,000 proves that, as to one item of damage, at least, the Plaintiff has sustained that amount of damage.

Then it was contended that the trustees have so conducted the sale which they made under the power in the instrument referred to, as that they could not make a good title. There was no time specified, as is agreed on all sides. Suppose I take it, which is the strongest way in which it can be put, that the trustees had acted

(1) Page 39. (2) Vol. i. p. 568.

honestly, but they had not considered duly the value of the thing which they had to sell, it does not make it an imperfect sale between them, and the purchaser from them. It is said that that might expose them to consequences from the *cestuis que trust*, and *Mortlock* v. *Buller* (1) is referred to for that purpose. *Mortlock* v. *Buller*, so far from proving that, proves only that where there has been gross negligence and gross carelessness on the part of trustees, the Court will not enforce specific performance at the instance of a purchaser if he has been misled, and will not fix him with it. But the bill there was dismissed without prejudice to the common law right to sue for damages. Suppose the action had been brought, and damages, no matter what amount, had been recovered against the trustees because of their negligence. Does that concern the *cestuis que trust* in the slightest degree? The trustees cast in an action for damages could not charge the amount of those damages against the trust estate, and the *cestuis que trust* are left therefore wholly untouched and unaffected by the proceedings that might take place between the trustees who were in default and the intended purchaser. Here the trustees, so far from having been guilty of any negligence, have done that which trustees are always advised to do. They have taken the opinion of competent persons to ascertain the value of the property to be sold. It cannot be said that they were obliged to put it up by auction. There may have been, and in many cases there are, very good reasons why an auction is not a desirable mode of selling. But I have not to inquire into that. They take the valuation of two persons; they are advised that the estate is worth £20,000; there was upon the estate what may be called an incumbrance, there was an agreement for a reversionary lease of the property, if I may call it by that name. The object of the trustees was an object which was consistent with their getting the best price they could for the estate, to put the purchaser into possession, and that could not be done in the face of the agreement. It might have led to litigation and difficulty of some sort or another, and therefore the tenant for life had entered into an agreement with the tenant in occupation that he would pay him £1000 to go clean out of the place. The objection was that the trustees, in selling for £20,000, had sold for

(1) 10 Ves. 292.

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less than it was worth. They desired to put that right. They first of all employed a most able surveyor and valuer to go down and ascertain for them what the value was. Then their previous impression is confirmed; but knowing that the whole £21,000 was trust money, and ought to come to them, and that if £1000 was to be paid to the tenant, that ought to be paid by somebody else, and not diminish the trust fund, they complete the purchase upon those terms, and that which had been an objection taken by the purchaser, Mr. *Edwardes*, in this case is communicated, and a clean plain title is shewn. Unless it could be said that trustees who have once made an involuntary mistake of that sort are not at liberty afterwards to correct it (and that is all that they did in that case), the case is reduced, as between them and their purchaser, to exactly the same proportions and the same nature as it would have been if there had been no tenant to receive £1000. The trust estate remains the same, the price of the trust estate remains the same, the trust estate receives all the benefit that was intended by the trustees when they exercised their power, and I cannot conceive a ground by which it can be said, after that has been done, that it is an objection to the title. If it was a valid objection, which for this purpose I am assuming it to have been, it has been cured, and it exists no longer.

Then the other ground relating to the title was, that when the conveyance came to be looked at by some future purchaser, he would find that *Noble* bought for £21,000, and the trustees sold to him at that price, and he himself a short time afterwards sold for £33,000, and that would be a blot upon the title. That can hardly be seriously stated. A man who speculates in land means always to get as much profit as he can. If, by his superior skill, he foresees that he can make an advantageous profit by working, cultivating, and improving a farm, certainly if it is worth his while he can do that, and it would be quite worth the while of anybody buying from him to pay him whatever in their respective judgments the land is worth, without considering what the then vendor gave for it himself. What is more common? It is every day's practice in this Court. In those joint stock companies which one hears so much about, purchases are made for a comparatively small sum, and the property is sold to a company

for a larger sum. Why? Because, by the exercise of talent, industry, and application of capital, the joint stock company have the benefit that they can make that, which was sold for £21,000, and which they are ready to give £33,000 for, worth their money.

With respect to *Goulton's* evidence. It appears to me perfectly *bonâ fide*, and his story is as plain as anything possibly could be, and is not affected by his having since become bankrupt, especially when accompanied by the explanation that his temporary difficulties were occasioned by his having unfortunately become surety for the debt of another; but still that he was able to pay 20*s.* in the pound upon all the debts which he had contracted. Is evidence of that sort to be rejected, and if not, is it not clear that the £1100 was a *bonâ fide* and not a fictitious rent? Then, as to the objection to title, it was put as a dilemma either that the trustees must have sold for less than the property was worth, or that Mr. *Goulton's* rent of £1100 must have been fictitious. There is no such dilemma. The trustees are proved, in my opinion, conclusively to have sold for no less than in the estimation of all the persons who have been consulted upon the subject competent to judge, could have been got for the land. That it was sold afterwards for more, can have nothing in the world to do with the case. Therefore, that one horn of the dilemma has entirely gone, as it seems to me, and the other horn that *Goulton's* rent must be a fiction is disproved in fact, so that the dilemma is a dilemma without any horns at all. Under those circumstances the case reduces itself to an exceedingly simple one. The Plaintiff in the action bought at £21,000 and sold for £33,000, by a contract which is wholly unimpeachable, in my opinion. It is not impeached, but the Defendant insists that he had a right to rescind it, because his conveyancing counsel pointed out objections, and then, without waiting to see if those objections could be cured, he then and there rescinds it, and he holds by that rescission. Those objections are, in my opinion, effectually removed, and the fact is, that, the Plaintiff being under the necessity of completing his own bargain of purchase (which he was compelled to do afterwards in a suit for specific performance), he does complete his purchase for £21,000. He gives sufficient and deliberate notice to the Defendant that an offer has been made to him for £25,000, which he will accept unless the Defendant completes his contract. The Defendant entirely declines

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to do that. The Plaintiff does sell for £25,000, and he does bring an action for the damage that he has therefore sustained. The action commenced on the 4th of May, 1876. The bill was filed in 1875, speaking of a threatened action. Then there was another application and another thing done. The parties joined issue in that action for damages, and in my opinion the Plaintiff in that action has clearly and distinctly proved that he is entitled to damages sustained by him in consequence of the wrongful breach of the agreement by the Defendant, Mr. *Edwardes*. I am of opinion that he is entitled to a decree to that effect, and to have an inquiry as to damages. It must be understood that the evidence before me, as far as my duty in assessing damages is concerned, satisfies me that to the extent of £8000 he is entitled to recover. What, if anything, he may be entitled to beyond that must be the subject of inquiry in Chambers. There are some claims made by him which it is necessary to say cannot be allowed. One of them has been mentioned, that is, the renewal of *Daniel Smith & Co.'s* valuation. There may be others, but whatever they are they will be investigated in Chambers; but to the extent of £8000 the Plaintiff is entitled to that sum for damages, and to the costs of the suit.

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From this decision the Defendant *Edwardes* appealed. The appeal was heard on the 9th of May.

Argument.

Sir *H. Jackson*, Q.C., *Matthews*, and *Morshead*, for the Appellant, in addition to the arguments used in the Court below, took this further objection :—

The contract was to be cancelled on the 29th of September, 1875, at which time the vendor admittedly had not a good title. This being an action for damages, and therefore time of the essence of the contract, the Plaintiff cannot recover any damages. The *Judicature Act*, 1873, having been suspended to the 1st of November, 1875, the clause (sect. 25, sub-s. 7), which declares that time shall not be of the essence of the contract, was not then binding.

They were stopped by the Court, who called on the counsel for the Respondent to anwer the new objection.

Kay, Q.C., and *Herbert Smith*, for the Plaintiff *Noble* :—

The contract did not provide that the purchase should be

necessarily completed on the 29th of September; only that the purchase-money should be paid; the completion of the contract on that day was treated as an open question: *Boehm* v. *Wood* (1); *Sansom* v. *Rhodes* (2); *Webb* v. *Hughes* (3).

JESSEL, M.R.:—

Judgment, C. A. Jessel, M.R.

I think it quite clear that the action cannot be sustained. I abstain from saying whether there was any agreement on which the vendor could recover at law, the agreement having been made before he had himself obtained a conveyance. But in this case, on the 29th of September, 1873, on which day, according to the plain meaning of the contract, the purchase was to be completed, the vendor had no title—he had none at law, for he had obtained no conveyance to himself—he had none in equity, because there was a blot on the title which he had not removed. The action is for damages for not completing the contract on the 29th of September, and the Plaintiff alleges in his statement of claim that he was ready and willing to complete it. In my opinion he was not ready and willing on that day; and as at law the day named in the contract is the day upon which the Plaintiff must be ready and willing to perform it, his action fails, and must be dismissed with costs.

JAMES, L.J.:—

James, L.J.

I am of the same opinion. Originally, this was a common law action. It was transferred to the Chancery Division, but the ground of the action cannot be changed by doing so. It is still a common law action by a vendor against a purchaser for not performing his contract. The vendor must shew that he was ready and willing to complete on the day named: he must shew that he had a title on that day. If he cannot do this, he cannot shew a breach of contract, because he could not perform that which was a condition precedent to its performance by the defendant. The question may not be important in future, because of the alteration in the law; but in the present case it is a fatal objection to the Plaintiff's action.

(1) 1 Jac. & W. 419. (2) 8 Scott, 544.
(3) Law Rep. 10 Eq. 281.

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Judgment, C. A. Baggallay, J.A.

BAGGALLAY, J.A.:—

This is an action for damages for breach of contract by reason of the Defendant not having paid the purchase-money on the 29th of September, 1873. The action was brought in August, 1875, in a Court of Common Law, the only place in which it could be then brought; and though it was transferred to the Chancery Division, the same rules must be applied as if it were still in a Common Law Court. The Plaintiff has, in my opinion, failed to shew that he was ready and willing to perform his part of the contract at the time appointed, and his claim must therefore be dismissed with costs.

Solicitors: *B. F. Watson; W. C. Smith.*

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1875
V.-C. M.
Nov. 15, 16, 17, 22, 23, 24, 26, 27, 29, 30; *Dec.* 1, 3, 4, 6, 7, 8.
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March 1, 22.
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Jan. 16, 19, 22; *Feb.* 9, 10, 12, 13. *April* 13.

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[1873 P. 72.]

Company—Sale of Forfeited Concession—Defective Title—Fraudulent Combination—Restitutio in integrum—Liability of Solicitors.

Certain persons who were owners of a concession from a foreign government combined together to form a company to purchase the concession, knowing at the time that through their default it was voidable and liable to forfeiture. The owners and others who were promoters of the company fraudulently sold the concession, being aware of the infirmity of the title, to trustees for the intended company, and it was transferred to the company by the trustees, who were to be paid a portion of the purchase-money for their share in the transaction. The solicitors for the vendors, who were also solicitors for the company, concealed the invalidity of the title, and the trustees neglected to require evidence to establish the title:—

Held (affirming the decision of *Malins*, V.C.), upon a bill filed by the company against the owners of the concession, the promoters, the trustees, the directors, and the solicitors, that the owners and promoters must repay the whole purchase-money; that the trustees who received money in the nature of a bribe for neglecting their duty must repay what they had so received; and that all the Defendants, including the solicitors, must pay the costs of the suit.

Statement.

THIS bill was filed in April, 1873. The Plaintiffs were the *Phosphate Sewage Company*, and the Defendants were *Edward Hertzberg Hartmont* and *Robert Spear Begbie*, who carried on

business as merchants under the style of *Hartmont & Co.*; *John Ogle*, a promoter of the company; *Francis William Engelbach* and *George Lawrence Keir*, accountants; *Thomas Hugh Cockburn*, *William Lewis Grant*, *Charles James Green*, and *William Lonsdale*; Messrs. *Elmslie, Forsyth, & Sedgwick*, solicitors; *Hildebrand Ramsden*, a solicitor; and *James A. Molleson*, the assignee in the bankruptcy of *Peter Lawson & Son*. Of these *Cockburn, Grant, Green, Keir, Ramsden*, and *Lonsdale* signed the memorandum of association of the company, and the first four named of these were directors.

The circumstances under which the company was established were as follows:—

The Defendant *Edward Hertzberg Hartmont*, whose original name was *Hertzberg*, had carried on business at *Paris* previously to 1867. He was actively engaged in two companies, the *Berlin Phosphate Company* and the *Ruby Mining Company*. In 1868 he became consul-general at *San Domingo*, at the same time carrying on business in *London* in partnership with the Defendant *Begbie*, under the firm of *Hartmont & Co.*

On the 1st of December, 1868, an agreement was entered into between *Hartmont & Co.* and the firm of *Peter Lawson & Son*, a long-established firm in *London* and *Edinburgh*, for carrying into effect for their common benefit three contracts, dated the 1st of June, 1868, which had been made with the Government of *San Domingo*. The object of the contracts were—

1. The negotiation of a loan with the Republic of *San Domingo* for £400,000 sterling.

2. The concession and working for fifty years of the guano deposits on the island of *Alto Vela* belonging to that republic.

3. The concession and working of certain coal-fields and other mines belonging to the republic.

By that agreement the three contracts or concessions were to be assigned by *Hartmont & Co.*, with whom they had been made, to *Lawson & Son*, who were to carry them into effect, paying *Hartmont & Co.* one-third of the net profits to be made out of all the businesses, but not so as to create a partnership between them.

For the concession of the 1st of June, 1868, was afterwards substituted one of the 8th of May 1869, which was made between

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M. *Curiel*, the Financial Minister of the Dominican Republic, of the one part, and *Hartmont & Co.* of the other part. It contained the following clauses:—

"Art. 1. The Government of the Dominican Republic concedes to *Hartmont & Co.* permission to work in the manner hereinafter determined the fields, layers, and rocks of guano, guanito, or phosphate of lime which exist in the island of *Alto Vela*, in such manner as is determined hereinafter, for a term of fifty years beginning July 1st, 1869.

"Art. 2. Messrs. *Hartmont & Co.* engage to defray on their sole and exclusive account all the expenses of the operations necessary for the extraction of the guano, guanito, or phosphate of lime mentioned in the foregoing article.

"Art. 3. Messrs. *Hartmont & Co.* engage to put the present contract into execution at the latest by the 1st of January next and to export annually a quantity of at least 10,000 tons of guano, guanito, or phosphate of lime."

Arts. 4 and 5 gave certain rights for constructing works for the purpose.

Art. 6 provided that the grantees should pay to the Dominican Government a tax of one dollar and sixty cents per ton for all the guano, guanito, or phosphate of lime which they should export from the island.

"Art. 7. The revenues derivable from this undertaking to the Dominican Government shall be employed in the service of the loan contracted for the Dominican Republic through the agency of Messrs. *Hartmont & Co.* The concessionaires of the present contract, or their assigns, are hereby authorized to pay into the hands of the contractors of the loan all sums due to the Dominican Government in respect of the workings herein conceded, and this until the reimbursement of the loan. When once this reimbursement shall have been effected, the duty shall be paid directly into the hands of the Government. In the event of the concessionaires not exporting the minimum quantity stipulated in Article 3, the Dominican Government shall have the right to declare the present concession void, and to take such measures as it may think proper.

"Art. 8. Messrs. *Hartmont & Co.* shall have the right to

transfer the whole or part of their concession to other houses, or to a company or committee of bondholders of the said loan."

Messrs. *Lawson & Son* proceeded to take active steps to search for and obtain guano from the island, and expended large sums of money, amounting to upwards of £39,000. The adventure, however, turned out unfortunate. There were no deposits of guano of any commercial value; no guano or phosphate of lime was exported from the island up to the 31st of December, 1870, and the concession, so far as the guano was concerned, appeared to be worthless. It was, however, ascertained that there was in the island a large quantity of a substance called phosphate of alumina, which it was expected would be valuable for purifying and utilizing the sewage of towns. Patents for this purpose had been taken out, among others by Messrs. *Forbes* and *Price*, in which phosphate of alumina was a chief ingredient.

This afforded a fair prospect of profit to the concessionaires of *Alto Vela*, on the assumption that the phosphate of alumina was included in the concession. This was afterwards questioned by the *San Domingo* Government, but it was not alleged that at the time any doubt had been thrown on the matter.

In this state of things it was proposed by *Lawson & Son* and *Hartmont & Co.*, in which firm *Ogle* was a clerk or agent, that a joint stock company should be got up to work the phosphate in connection with this patent process.

Messrs. *Engelbach & Keir* were applied to as financial agents for that purpose. They undertook the business; and accordingly made a provisional agreement with Messrs. *Forbes* and *Price* for the purchase of the patents.

On the 21st of December, 1870, an agreement was signed by *Begbie*, who acted on behalf of *Hartmont & Co.*, and *Lawson & Son*, as vendors, and *Engelbach* as purchaser, for the sale of the island of *Alto Vela*, held under the *San Domingo* Government for fifty years, with all the buildings, plant, &c., thereon, and all patents belonging to the vendors in relation to the phosphate process, to *Engelbach* for the sum of £65,000 in fully paid-up shares of a company which was to be formed in *England;* but that these shares should be "B" shares, which were to be subject to a provision that the "A," or cash shares, should receive a 10 per cent. dividend before

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the "B" shares received any dividend. And it was provided that the purchaser might at any time within six months from the 3rd of January then next cancel the agreement if he had elected not to continue his agreement with Messrs. *Forbes & Price.*

This agreement was duly confirmed by *Lawson & Son.*

Messrs. *Engelbach & Keir* stipulated that they were to have as a commission, if they succeeded, £15,000 in shares; and it was arranged that the remaining £50,000 in shares should be divided between *Hartmont & Co., Lawson & Son,* and *Ogle,* in proportions agreed on between themselves It was further arranged that £420 should be paid to *R. Ramsden* and £262 10s. to *Elmslie & Co.* out of the funds in the intended company, in consideration of their respective services in carrying the scheme into effect.

Engelbach having thus acquired provisionally the patents and the concession, proceeded to form a provisional committee of the *Phosphate Sewage Company,* consisting of *Begbie,* who was *Hartmont's* partner, *Engelbach, Keir,* Colonel *Grant,* and Mr. *Ramsden,* solicitor to *Engelbach & Keir. Begbie* having become unwell, his place was taken by the Defendant *Ogle. Hartmont* did not openly appear on the committee, but it was proved that *Begbie* and *Ogle* acted entirely for him, and throughout received instructions and directions from him.

The committee had experiments made which appeared to them successful. A sum of £1550 was subscribed to pay £1000 cash deposit which was required by Messrs. *Forbes* and *Price,* and to defray the expense of the experiments, with the understanding that the persons so subscribing should have the pre-emption of the A shares, in case of the formation of the company, as a remuneration for their risk, the company reimbursing them the outlay.

It was considered that a cash capital of £25,000 would be sufficient to start the company. It had been stipulated from the first that Messrs. *Elmslie, Forsyth, & Sedgwick,* who were the solicitors for the vendors, should be the solicitors to the company.

The agreement with Messrs. *Forbes* and *Price* was that they should receive for their patents £6000 cash (including the £1000 paid as a deposit), and £10,000 in B, or deferred shares, or in lieu thereof, at the option of the purchasers, £5000 in cash.

According to this proposed scheme of the company there would have been £75,000 vendors' deferred, or B shares, and £25,000 cash, or A shares, and *Engelbach & Keir* would have acquired the absolute right to the island of *Alto Vela*, and also to the patents in return for such £75,000 B shares. But the promoters were advised by Messrs. *Walker & Lumsden*, their stockbrokers, that there would be difficulties on the *Stock Exchange* with a company so constituted with only £25,000 cash and £75,000 vendors' shares.

Accordingly, meetings of the provisional committee were held in the months of February and March, 1871, at which it was ultimately agreed that the capital of the proposed company should be increased from £100,000 to £105,000, but there should be no distinction of A and B shares, and that £5000 in shares should be allotted to the subscribers to the £1550 fund, who were entitled to the A shares in consideration of their giving up their preferential interest. This was agreed to by the subscribers to the £1550 fund.

In the meantime a private arrangement was in progress between *Lawson & Son* and *Hartmont* for the sale to *Hartmont* of their interest in *Alto Vela*, which was reduced into writing in a letter dated the 1st of March, 1871, from *Lawson & Son* to *Hartmont*, which contained the following paragraph :—

"We have much pleasure in confirming the arrangement you have made for the disposal of our interest in the company in course of formation for the purchase from us of the concession of *Alto Vela* and the property and effects thereon, as per agreement with Mr. *F. W. Engelbach*, viz.: We are to retain £5000 in shares of the company, which shares we undertake not to sell or dispose of for twelve months, and we are to receive from you in full for interest in said agreement £10,000 in cash or approved bills on or

before the 15th March	£10,000
In your acceptances due 18/21 April . . .	2,300
	£12,300

"We further undertake to hand over to you the bills of lading of the cargo of phosphate for "*Vivat Veritas*," and any other cargoes that may arrive, you engaging to pay freight and charges

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thereon according to bills of lading . . . . On receipt of the above-mentioned sum of £10,000 we undertake to hand over to you, and for transfer to your order, the balance of the shares receivable from the company under Mr. *Engelbach's* agreement."

Two documents were then executed:—(1) A deed dated the 20th of April, 1871, by which *Hartmont* and *Begbie* transferred and assigned to *Lawson & Son* the concession for the residue of the term of fifty years. The deed contained a covenant by the vendors that notwithstanding any act done or suffered by them the concession was a good, valid, and subsisting concession, and in nowise void or voidable. (2) Articles of agreement dated the 28th of April, 1871, made between *Lawson & Son* as vendors, and *Engelbach & Keir* as purchasers, which recited that a company was about to be formed for the purchase of the *Alto Vela* concession, and that *Engelbach* had entered into an agreement to purchase from *David Forbes* and *Astley Price* the before-mentioned patents. It was agreed that as soon as such company should be registered *Lawson & Son* should sell, and the company should purchase, all the right and title belonging to the vendors in the island of *Alto Vela*, and also the exclusive right to, and the benefit of the inventions of *D. Forbes* and *A. Price* for the treatment of phosphate of alumina, for which letters patent had been granted. And it was agreed that the consideration for the sale should be £65,000, to be paid thus:—£20,000 in fully paid-up shares, and £45,000 in cash, to be paid upon the completion of the sale. The agreement also, in clause 3, stated that the vendors had delivered to the purchasers all the documents of title shewing their right to the concession, and that the purchasers' solicitors, having examined the same, had testified their acceptance of the vendors' title.

With respect to acceptance of the title by the purchasers, *Engelbach & Keir*, the following facts were proved:—

Engelbach & Keir employed Mr. *Ramsden* as their solicitor, who consulted counsel in the usual way, and the counsel made certain requisitions as to title: in particular, first, that proof should be given that *Alto Vela* belonged to the Government of the Dominican Republic; and secondly, that proof should be furnished that the conditions of the concession had been complied with, so as to shew that the concession had not become void or voidable. These

requisitions could not be complied with, and thereupon *Engelbach & Keir* put themselves in communication with Messrs. *Elmslie & Co.*, the vendors' solicitors, of whom *Forsyth* was the partner who acted in the matter. *Forsyth* assured them that the title was perfectly good, that insisting on requisitions would cause great delay, and that they might safely rely on *Lawson & Co.'s* covenants for title. It was therefore agreed that the requisitions should not be insisted on, and that the usual covenants for title by the vendors should be accepted. Mr. *Ramsden* considered that the real responsibility of advising on the title was with the solicitor designate of the company about to be formed, and that his sole duty was to take care that *Engelbach & Keir* did not incur personal responsibility. This being communicated to the counsel, he advised that, as *Engelbach & Keir* were merely trustees or agents for the company proposed to be formed, and as Mr. *Ramsden* was their solicitor exclusively, and not the company's, the contract should be entered into expressly subject to approval by the company within a given time after its formation, and in default of such approval to be void.

It was originally intended that there should be a written agreement as to *Engelbach & Keir's* right to £15,000 commission, but that intention was abandoned in order to avoid any necessity of referring to that agreement in the prospectus, under the provisions of the *Companies Act*, 1867.

On the 8th of May, 1871, the Plaintiff company was registered under the Companies Acts with a capital of £200,000, divided into 20,000 shares of £10 each, with a memorandum and articles of association which were signed by *Cockburn, Grant, Green, Lonsdale, Keir*, and *Ramsden*. The objects of the company were stated to be to adopt and carry into effect an agreement of the 6th of January, 1871, which was for the purchase by *Engelbach* of the two patents of *Forbes* and *Price*, and to adopt and carry into effect the articles of agreement of the 28th of April, 1871, between *Lawson & Son* and *Engelbach & Keir*, to purchase the *Alto Vela* concession, to purchase any letters patent for the utilization of sewage, or for the preparation of guano and other manures, and for other purposes requisite for the carrying on of the business of importers, manufacturers, and dealers in guano and other manures.

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The first directors were *Cockburn*, *Grant*, *Green*, *Keir*, and *H. Graham Lawson*, and shortly after the incorporation of the company the Defendant *Hartmont* was elected a director, and was subsequently elected chairman of the board of directors, and he continued to hold that office until he resigned, in the month of November, 1872. On the 6th of February, 1872, the Defendant *Lonsdale* was elected a director of the company.

A prospectus was issued by the company containing the following statements:—

"This company is formed for the purpose of working patents for *Great Britain* and *Ireland*, *France*, and *Belgium*, which have been purchased from Messrs. *Forbes* and *Price*, for the defecation and utilization of sewage, either by irrigation or precipitation. Patents have been since secured on behalf of the company in other countries. The phosphate of alumina, which is the agent employed in these processes, is a material product existing in large quantities on the island of *Alto Vela* in the Republic of *San Domingo*. Before being used it is rendered soluble by treatment with sulphuric or other acid. The company have purchased from Messrs. *Peter Lawson & Son* the assignment of a lease which they hold from the *San Domingo* Government, for the sole and exclusive right of working and exporting the phosphate of alumina, together with all guano, guanitos, &c., and other minerals from the island of *Alto Vela*, for a term of fifty years from 1869, subject to a royalty on the tonnage exported, and the company have likewise acquired the right to a valuable patent belonging to those gentlemen for treating chemically the products of the island. This purchase includes all the buildings, storehouses, &c., which have been erected upon the island, and the mules, carts, barges, and tools and necessary plant for working and exporting the phosphate, &c.; and the company have secured the services of the adequate European staff and natives already employed on the works. The island has been thoroughly surveyed.

"The present arrangements are sufficient for the exportation of 10,000 tons annually, but as the company propose to work the island on a much more extended scale, tramways will be laid down and further appliances erected to facilitate shipment. The

vendors have expended more than £39,000 up to the present time in connection with the island of *Alto Vela*, besides the payment to the *San Domingo* Government. The amount to be paid to Messrs. *Forbes* and *Price* for the purchase of their patents is £16,000, viz., cash £6000, and the balance in paid-up shares; and the amount to be paid to Messrs. *Peter Lawson & Son* for their patent and for the buildings, plant, &c., upon the island, and for the sole right of exporting the phosphate of alumina and other guanos, is £65,000, viz., £20,000 in paid-up shares, and the balance in cash. £5000 in fully paid-up shares has been allotted to those parties who subscribed the money necessary for thoroughly testing this process. The process has been subject to a thorough and exhaustive test by application to sewage on a large scale at *Tottenham*, with perfectly satisfactory results."

The deeds of the 20th of April and the 28th of April, 1871, were also set out in the prospectus.

The bill charged that the statement in the prospectus that the vendors had expended more than £39,000 up to that time in connection with the island was, as the Defendants well knew, untrue. With respect to that statement the following entry was made in the minute-book of the directors on the 22nd of May, 1876:—"The solicitor stated that he has the accounts now in his possession confirming the truth of that statement; the said accounts having come into his possession for an independent purpose, without reference to the formation of the present company and previous to its being projected."

The bill also charged that, according to the true construction of the prospectus, the £5000 in fully paid-up shares allotted to those persons who subscribed the money for testing the company's patent process was therein represented to be in full satisfaction of the claims by such persons, without any additional sum of £5000 cash.

The directors in the first instance determined upon issuing only 12,000 shares, representing £120,000 of the nominal amount of capital, and the prospectus stated that £35,000 of that amount was represented by vendors' fully paid-up shares, and 2000 shares having been subscribed for, the balance of 6500 was offered to the public.

Consequent upon the issue of the prospectus, applications were

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received for 8606 shares, and 8107½ were allotted, but of this number 4500 were applied for by the Defendants *Hartmont*, *Begbie*, and *Ogle*, and the Defendants *Lonsdale*, *Green*, *Forsyth*, and *Graham Elmslie*, son of the Defendant *Elmslie*, and others as their nominees.

By a letter of the 17th of March, 1871, addressed to the directors, *Lawson & Son* authorized them to hand over to *Ogle* £43,000 in cash and shares out of the purchase-money of £65,000. And by a further letter the directors were authorized to hand over to *Ogle* £15,000 in fully paid-up shares, further part of the purchase-money.

By an indenture of the 29th of May, 1871, made between the *Lawsons*, as vendors, of the one part, and the company, as purchasers, of the other part, the vendors assigned and transferred to the company the contract or concession of the 8th of May, 1869, with all the rights appertaining thereto, and all effects upon the island of *Alto Vela*, on the 28th of April, 1871, and the vendors covenanted that, notwithstanding anything by them done or knowingly suffered, the contract or concession was then valid and subsisting, and that they had power to assign and transfer the premises to the company, and the company covenanted to keep the vendors indemnified against the payments in the concession stipulated to be paid, and the performance and observance of the stipulations and provisions contained in the concession.

This indenture was prepared by the Defendant *Ramsden*, and approved by *Elmslie, Forsyth, & Sedgwick*, as solicitors of the company. A meeting of the directors of the company, at which were present the Defendants *Grant*, *Green*, and *Cockburn* (*Grant* in the chair), and the Defendants *Ogle* and *Lonsdale*, and the Defendant *Forsyth* as solicitor for the company, was held on the 31st of May, 1871, at which *Forsyth* read a statement to the effect that the deeds relating to the concession had been handed over to the solicitors of the company by *Lawson & Son*, and assured the board of the validity of the transfer and of his possessing a receipt in full of all demands, and it was resolved that certificates for fully paid-up shares should be issued to *Lawson & Son* for the purchase-money, in pursuance of the agreement with them, and at the same time it was resolved that share certificates representing £45,000 be

issued to *Ogle* as the representative of *Lawson & Son*. Fifteen fully paid-up share certificates in the several names of *Hartmont, Ogle, Lonsdale, Green, Graham Elmslie,* and *Forsyth,* and others, their nominees, for several numbers of shares, making together 4500 shares, were accordingly issued; 1500 fully paid-up share certificates were also issued to *Ogle,* and a certificate for 500 shares fully paid up, making in all the £65,000 mentioned in the prospectus, as agreed to be paid to them, was issued to *Lawson & Son*. In addition to these shares, there were also issued 655 fully paid-up share certificates, value £6550, to the persons who found the capital for testing the phosphate process, being £5510, the amount subscribed, and £5000 bonus.

The 500 shares represented the share of the purchase-money to which *Lawson & Son* were entitled, pursuant to the arrangements made by *Hartmont, Begbie, Ogle,* and *Lawson & Son* between themselves. The 4500 shares represented *Hartmont, Begbie,* and *Ogle's* share, and were divided thus:—*Hartmont* 3000, *Begbie* 750, *Ogle* 750. The 1500 shares represented the sum of £15,000, which it had been arranged should be paid to *Engelbach & Keir* out of the purchase-money, and were issued to *Ogle* on their behalf, and were shortly afterwards transferred by him as directed by them. Out of *Hartmont's* shares 150 were placed in the name of *Graham Elmslie,* and 200 shares in the name of *Forsyth,* 500 in the name of *Green,* and 200 in the name of *Lonsdale.* In addition to this distribution of shares, Colonel *Grant,* the chairman, received a present from *Engelbach & Keir* of 100 shares; and General *Green* received his qualification as a director from *Hartmont.*

At a meeting held on the 2nd of August, 1871, a sum of £1250 was voted to *Engelbach* in full discharge of all claims of *Engelbach & Keir* for their services in connection with the concession of the island, and of the patents of *Forbes* and *Price;* and their preliminary expenses, amounting to rather more than £2000, were also ordered to be paid. Mr. *Lonsdale* was appointed secretary of the company at a salary of £300.

On the 15th of June, 1871, the directors applied to the committee of the *Stock Exchange* for a settling day, and quotation of the shares in the company, and for that purpose forwarded to the committee several documents, including a certificate signed by

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Colonel *Grant* as chairman, and by *W. Lonsdale* as the secretary of the company, which certified as follows:—1st. That there were applied for by the public 8606 shares. 2nd. That 8107 shares were unconditionally allotted, on which £4023 10*s.* had been paid on application, at 10*s.* per share, and £4023 10*s.* on allotment, being at the rate of 8047 shares at £1 per share; that 60 shares had not been paid on allotment. 3rd. That the following shares, not included in the public allotment, had been allotted: 155 shares fully paid up allotted to the various gentlemen who subscribed £1550 to pay Messrs. *Forbes* and *Price* £1000 as part purchase-money, and to test the process on a large scale, agreeably to the arrangements entered into with them, that they were to receive fully paid-up shares on account of their subscription; 1000 shares fully paid up allotted to the patentees, Messrs. *Forbes* and *Price*, agreeably to the contract entered into with them; 2000 shares fully paid up allotted to the vendors, Messrs. *Lawson & Son*, as part purchase-money of the island of *Alto Vela*; 500 shares fully paid up allotted rateably among those gentlemen who subscribed £1550, as noticed above. 4th. That no shares had been conditionally allotted. 5th. That the share certificates were ready for delivery, and that there was no impediment to a settlement.

On the faith of the certificate, the committee of the *Stock Exchange* granted a settling day and quotation of the shares in the company. It was one of the rules of the *Stock Exchange* not to grant a settling day unless two-thirds of the shares (other than those reserved or granted in lieu of money payments to vendors or concessionaires) had been applied for and unconditionally allotted.

Having obtained a settling day, the Defendants (other than *Molleson*) respectively, and *H. G. Lawson*, proceeded to operate in the shares of the company on the *Stock Exchange*, and succeeded in raising the price of the shares to a very large premium. In order, as the bill alleged, further to raise the price of the shares, the Defendant *Hartmont* (who had become a director and the chairman of the company) induced his co-directors to authorize him to enter into a contract, dated the 6th of March, 1872, on behalf of the company, for the sale of the French patents to two persons named *Emil Oppert* and *Gustavus G. Josephson*, who were carrying

on business in *London* under the name of *Emil Oppert & Co.*, for £250,000, payable £4000 in cash, £46,000 within six months, and the balance of £200,000 within twelve months. Upon its becoming known that the company had sold its French patents for £250,000, a considerable rise took place in the shares.

On the 8th of March, 1872, *E. Oppert & Co.* addressed to the directors of the company a proposal to pay £150,000 in cash, instead of £250,000 within twelve months, and an extraordinary general meeting was held on the 16th of March to consider the proposal. A poll was demanded by a shareholder, who was a nominee of *Hartmont*, and the same was fixed for the 26th of March. In consequence of this proposal there was a further rise in the shares, and *Hartmont*, during the interval, sold large numbers of shares at a high premium. In particular, on the 18th of March, he sold 1000 shares at the price of £56 per share for cash, and received the proceeds thereof. At the poll, however, the Defendants *Hartmont*, *Begbie*, *Ogle*, and *Green*, and their nominees, and *Forsyth* and *G. Elmslie*, by their direction, voted against the proposal, and it was rejected.

The bill charged that *Oppert & Co.* purported to pay £4000 and £10,000, but that these sums were in fact paid by the Defendant *Hartmont*, that no other sums were ever paid in respect of the pretended contract, and that the same was never really intended to be carried into effect, but was a mere device for raising the price of the shares of the company in the market; and that by the means aforesaid the Defendants, or some of them, and *H. G. Lawson* succeeded in raising the price of the £10 shares to nearly £60, and the Defendants made enormous profits thereby; that the Defendant *Hartmont* alone sold 5350 shares out of his own name, and 128 out of the name of *Montefiore*, his clerk; the Defendant *Keir* 350; *Ogle*, 2189; *H. G. Lawson*, 500; *Grant*, 800; *Green*, 550; *Lonsdale*, 396; *Forsyth*, 233; and *Ramsden* 58 shares; that by these proceedings of the Defendants the company was brought into great discredit, and that the shares therein were only worth £3 in the market when the bill was filed; that the greater number of the present shareholders in the company were persons who were induced by the proceedings of the Defendants to purchase their shares in the market at a large premium.

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On the 5th of October, 1872, the secretary of the company received from Colonel *Mendes*, the Charge d'Affaires of the Dominican Republic in this country, the following letter:—

"The Government of the Dominican Republic has entrusted me with the mission of coming to *London* for the purpose of definitely settling all the differences which may arise in consequence and out of contracts and treaties concluded on the 1st of May, 1869, with the firm of *Hartmont & Co.*, among which was that of the concession made to the said firm for working guano in the island of *Alto Vela*. As the firm of *Hartmont & Co.* had not made known to the Dominican Government the transfer or transfers which it may have made of its privilege, I have been compelled immediately upon my arrival here still to apply to the same, in order to arrive at the real position of affairs, and consequently I addressed to the said firm, under date of the 28th of last August, the note, a copy of which you will find enclosed herein. But since that time Mr. *Hartmont* on the one hand, and the Dominican Government on the other, have acquainted me with the fact that the working of *Alto Vela* was at the present moment for account of the company called Phosphate Sewage without my Government being able to afford me any further particulars with regard to the way in which had been effected the said transfer of the privilege originally granted to Mr. *Hartmont*, for the simple reason of my said Government being itself ignorant thereof. But if I refer to the prospectus of the company on one side, and on the other side to the positions of the exportations of guano, guanitos, and phosphate of lime from *Alto Vela*, I am led to the following conclusions, namely, that on the 28th of April, 1871, the date of the transfer made to you of the working of *Alto Vela*, the right to such working had already ceased to exist, owing to the fact that in the course of the year 1870 a quantity of 1981 tons of guano only had been exported from the island in question. From that time the parties working *Alto Vela* in the year 1870 had already incurred the forfeiture of their right thereto, and could not therefore take upon themselves to sell to you on the 28th of April, 1871, as above, a thing which they possessed no longer the slightest right to. It would therefore remain to be seen and examined whether, on the one hand, the phosphate of alumina were really understood and contemplated in the original

concession. Upon the whole, therefore, the Dominican Government abides by the full tenor of the note of the 28th of August, 1872, hereunto annexed, as regards the *Phosphate Sewage Company*, leaving the latter at liberty to adopt those measures the same may deem proper, in case the said company should consider that the responsibility of its present position ought to be brought home."

The note of the 28th of August, 1872, was in these words:—

"In conformity with a treaty bearing date of *St. Domingo* the 1st of May"—then he recited the 3rd article—"the Dominican Government takes into consideration the fact that neither in the course of the year 1870 nor in that of the year 1871 have the grantees complied with this most essential clause of their contract. In consequence thereof the Government has the right from this moment to declare the said grantees as having forfeited their concession. This right the Government reserves to itself, even in the event of the minimum quantity stipulated for being reached by the grantees in future. The Government, however, is quite disposed to enter into fresh arrangements with the said grantees with the view of saving to the latter the forfeiture, provided the future interest of the government is not prejudiced thereby."

The Defendant *Hartmont*, in fact, received the last-mentioned note from Colonel *Mendes* on the 28th of August, 1872, but he withheld it from the other directors and from the shareholders, and he gave no information to them respecting the contents of the note. After considerable pressure on the part of his co-directors, *Hartmont*, shortly after the 20th of November, 1872, resigned his seat at the board of the company. The directors, on receipt of the letter of the 4th of October, entered into negotiations with Colonel *Mendes* for the purpose of getting the forfeiture of the concession rescinded, and offered very liberal terms for that purpose. Colonel *Mendes*, however, refused the offer of the directors, and notified to them not to send any more ships to the island, as they would not be loaded.

In the meantime the directors of the company did not take any active steps to carry on the business, or to export the requisite quantity of guano and phosphate from the island of *Alto Vela*. Under these circumstances, the shareholders being dissatisfied

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with the position of the company, a meeting was called, and a committee of shareholders was appointed to investigate the affairs of the company, when for the first time they became acquainted with the facts relating to the title to the concession, and the circumstances under which a settling day had been obtained, and the other facts before stated.

None of the Defendants were now directors or solicitors of the Plaintiff company. Messrs. *P. Lawson & Son* had recently been adjudicated bankrupts, and were insolvent, and their estate was under sequestration in *Scotland*. The Defendant *J. A. Molleson* had been appointed trustee of their estate. Further negotiations had taken place with the agents of the Dominican Government, but they declined to recognise the transfer of the concession to the Plaintiff company, and insisted upon treating it as absolutely forfeited at the date when *Lawson & Son* purported to assign the same to the company; and the agents of the Government further alleged that they had granted the working of the island of *Alto Vela* to a French company.

The bill prayed that it might be declared that, under the circumstances, the sale of the said concession of the 8th of May, 1869, to the Plaintiff company was fraudulent and ought to be set aside, and that the aforesaid combination of the Defendants (other than the Defendant *J. A. Molleson*), and of the several members of the firm of *Peter Lawson & Son* for the purposes aforesaid, was fraudulent, and the company ought to be relieved from the consequences thereof, and also that it was a breach of trust on the part of the Defendants *Keir*, *Cockburn*, *Grant*, and *Green* (the directors of the Plaintiff company) to pay the sum of £65,000, or permit the same to be paid in manner aforesaid out of the funds of the Plaintiff company for the purchase of the said concession, and that the Defendants (other than *Molleson* and *Ramsden*), all of whom were engaged either as vendors or as promoters, or directors, or solicitors of the Plaintiff company in the said transactions, and the estate of Messrs. *Peter Lawson & Son*, were jointly and severally liable to make good to the Plaintiff company the said sum of £65,000, together with interest thereon at 5 per cent. per annum, and that the said Defendants might be decreed to pay the said sums and interest, and the Plaintiff

company might be at liberty to prove against the estate of Messrs. *Peter Lawson & Son* for the same accordingly, the Plaintiff company being willing and thereby offering to account in such manner as the Court might direct for the profit (if any) made by them from the working of the said island of *Alto Vela* since the transfer thereof to the company.

Or, if the Court might not think fit to set aside the said purchase altogether, the said above-named Defendants might be decreed to replace the sum of £15,000 improperly paid in shares to the Defendants *Engelbach & Keir* in excess of the purchase-money payable to the vendors.

The bill further prayed that a certain sum of £955 in respect of costs of experiments ought not to have been paid out of the funds of the company in addition to £5000 in fully paid-up shares, and that *Engelbach, Keir, Cockburn, Grant,* and *Green,* were jointly and severally liable to make good to the company the said sum of £955, with interest thereon.

That the Defendants *Hartmont, Engelbach, Keir, Cockburn, Grant,* and *Green* were liable to replace the sums amounting to rather more than £3250 so paid to *Engelbach & Keir,* or so much as should not have been properly applied by them for the purposes of the company.

That it might be declared that *Ramsden* was not entitled to receive the £420 so paid to him, and that he might be ordered to replace the same.

That *Elmslie, Forsyth, & Sedgwick* were not entitled to receive the £262 10*s.* so paid to them, and that they should be ordered to replace the same.

That an account might be taken of the dealings and transactions between the company and *Ogle* as their mercantile agent, and that an injunction might be granted to restrain the Defendants from dealing or parting with any shares of the company standing in their names, and to restrain actions being brought against the company by *Elmslie & Co.* for their bill of costs.

The answers of the several Defendants, so far as they were material in contradicting or explaining the statements in the bill, were to the following effect:—

The Defendant *E. H. Hartmont* alleged that in the year 1871,

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previous to the assignment of the concession to the Plaintiff company, the Dominican Government, with the knowledge of the deficiency in the quantity of export, received the royalties and export duties on several cargoes of guano or guanito exported by *P. Lawson & Son* from the island, which royalties and duties were received on the 22nd of January and the 6th of February, 1871, and had waived its right to annul the concession, and that the concession at the date of the assignment was not voidable or liable to forfeiture.

He admitted that phosphate of alumina was not mentioned in the concession, but alleged that the Government had never contended that alumina was not included in the term guanito, and that if such a contention had been raised it would have been a gross breach of faith on the part of the Government, since the word "guanito" was expressly introduced into the concession in order to make sure that such phosphates were comprised therein, and the royalty or export duty payable to the Government was fixed in the final concession at a lower rate per ton than had been at first named to compensate for the supposed inferiority in value of phosphate of alumina, which it had become known was the principle product of the island, to guano properly so called; and, further, that it had been shewn from evidence that phosphate of alumina was a mineralised guano which had undergone chemical alteration, and that, therefore, it fell within the meaning of the term guanito or guanite. That the Defendant was absent from *England* from the 1st of February to the 4th of September, 1870, and from the 9th of November, 1870, to the middle of January, 1871, and that he took no part personally in the negotiations for the sale of the concession to the company, but that it was conducted by *P. Lawson & Son*, *Begbie*, and *Engelbach & Keir*. He denied that there was an intention on the part of any persons concerned to purchase the concession with a knowledge that it was voidable and liable to forfeiture. He denied any collusion between the Defendants to conceal any of the facts relating to the concession, and he particularly denied that there was any scheme for raising the price of the shares in the market. He believed the statement made by *Lawson & Son*, that £39,000 had been expended on the island, to be perfectly true. He denied that the *Stock Exchange* would have

refused a settling day if they had been informed of the true facts relating to the 4500 shares; on the contrary, he had been informed by an eminent stockbroker that if the vendors were desirous in their own interests to invest the cash payable on account of the purchase-money in shares of the company, they were at liberty to do so by applying for shares in the ordinary way. He denied influencing the directors to vote in favour of the deferred payment offered by *Oppert & Co.*, and believed it to be a *bonâ fide* offer. He denied that the £14,000 paid by *Oppert & Co.* was provided by him, though he had guaranteed the repayment to the firm from whom it was borrowed by *Oppert & Co.*

R. S. Begbie stated that on the 1st of December, 1868, he had sold his interest in the firm of *Hartmont & Co.* to *Hartmont* for £500, which was computed to be about its value, and although the name of *Hartmont & Co.* was afterwards used in connection with the concession from the Dominican Government, he had no further interest in that concession, and was not one of the vendors to the company. In carrying out the arrangements with regard to the sale it was settled that he and *Hartmont* should make an absolute assignment of the concession to *Lawson & Son* as a separate and distinct transaction, to which *Engelbach & Keir* should not be parties, and that on the completion of such assignment *P. Lawson & Son* should assign the concession to the proposed company. Under these circumstances he was only a formal party to the assignment.

The Defendant *Ogle* stated that *Hartmont & Co.*, in consideration of the services rendered to them, had agreed to allow him $33\frac{1}{3}$ per cent. on the profits derived out of all the transactions connected with the Government of *St. Domingo*. He took no part in the negotiations for the sale to the company except as agent of *Hartmont & Co.* He admitted that 3450 shares in the company were at his request applied for by various persons and handed to him, the deposit of £1 upon such shares having been paid by *Hartmont*, and that all the persons who applied for such shares signed blank transfers thereof, which were kept by the Defendant for a time, and then handed by him to *Hartmont* and distributed amongst his friends, but in what proportions he could not state.

Messrs. *Engelbach & Keir*, in their defence, said they undertook,

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at the request of a merchant named *Parry*, to assist in the formation of the Plaintiff company, and they were to find cash capital to the amount of £5000. They then negotiated with Professor *Forbes* and *Astley Price* for the purchase of their patent, for which they were to receive an immediate payment of £1000 cash, and further sums to the amount of £5000 in cash, and in addition, at the option of the company, either to have 10 per cent. of the shares of the company as fully paid up, or to receive a further sum of £5000 in cash. The remuneration of the Defendants for their services and obtaining subscriptions for preliminary expenses was to be a commission of £15,000 in B shares of the company, and a further commission of £5 per cent. on all cash subscriptions obtained by them. They then stated the preliminary arrangements made for testing the treatment of manures by means of the patents; that in all the negotiations and transactions preliminary to bringing out the company they acted under the advice of their solicitor, Mr. *Ramsden*, and the agreement for the purchase of the concession was discussed by them with *Ramsden;* the question at the time was as to the risk of future forfeiture of the concession. The title to the concession at that time was not in any way raised. They had given instructions to their solicitor to look into the title and prepare the contract for the purchase of the concession. Their solicitor, Mr. *Ramsden*, took counsel's opinion upon the abstract of title, and requisitions were made by counsel, and it was the company's own solicitors who insisted on their requisitions being waived, and who ultimately approved the conveyance to the company without making further requisitions. They stated that they had paid *Ramsden* £420 for his bill of costs in respect of the business done for them. They also paid *Elmslie & Co.* the sum of 250 guineas for their professional services preliminary to the incorporation of the company.

The Defendant Colonel *Grant* stated that he fully believed in the *bona fides* of the whole scheme of the company, and had the most perfect confidence in the sincerity and capability of his co-directors and the promoters of the company, and in the professional acumen and integrity of the firms of *Elmslie & Co.* and *Walker, Lumsden, & Co.*, who were the solicitors and brokers of the company, and he had no idea that any question could be raised as to

the validity of the concession. With respect to the certificate and statement laid before the *Stock Exchange* for obtaining a settling day, the Defendant was staying at *Sutherland*, 800 miles from *London*, in June, 1871, when the certificate was sent to him, and he felt such perfect confidence in his colleagues, and in the professional knowledge of the brokers of the company, that he considered himself justified in signing the documents, and he was quite unacquainted with the rules of the *Stock Exchange*. With regard to the statement in the prospectus that £39,000 had been expended on the development of the resources of the island of *Alto Vela*, he had every reason to feel satisfied, from the information on the subject given by the Defendant *Forsyth*, that the statements were true. Acting on the favourable impression he had of the company, he at first applied for 235 shares, and then for 200 more shares. Some time afterwards he received ninety shares from *Engelbach* and also a cheque for £100. The Defendant had opposed the proposal as to the deferred payment to be accepted from *Oppert & Co.*, and because the directors would not accede to his desire that immediate payment should be accepted, and from pressure of other business, he resigned his seat at the board on the 20th of April, 1872. He fully believed that the true meaning of the prospectus was that the sum of £5000 in fully paid-up shares, said to have been allotted to the parties who subscribed the money for the experiments, was not in full satisfaction of the claims of such subscribers, but was a bonus by way of recompense for their risk, and a recognition of the success of their efforts on the company's behalf.

The Defendant *Charles J. Green* stated that he was in active service in the army till 1860, when he returned from *India* with the rank of Major-General. He was first asked to join the company in March, 1871, by his nephew, *W. Lonsdale*. Wishing to qualify himself to be a director, he purchased, between November, 1871, and October, 1872, in the open market, 171 shares at an average price of £40 per share. In May, 1871, ten shares were allotted to him, and in May, 1872, seventy-three new shares were also allotted him, upon which he paid £10 per share. Of the said 254 shares he sold twenty shares in 1872, at an average price of £28 10*s.*, and also thirty more

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shares, but at what price he could not recollect. Of the remaining 204 shares he was still the owner; he had consequently lost very considerably by the company. He had no beneficial interest in the 500 shares which he held in trust for *Ogle*, and he at once transferred them when called upon to do so by the beneficial owner, and never received any consideration for so doing. In all matters connected with the *Alto Vela* concession, the provisional committee relied on the advice of their professional advisers, and the purchase was completed by the original directors of the company under the advice of the company's solicitors. He and his co-directors believed that the concession was then valid, and he submitted that they had not been guilty of any breach of trust. He knew nothing about the formation of the company until all the preliminaries were arranged and the prospectus was already issued. He was then invited to join the board, and he then for the first time saw the co-Defendants, except *Hartmont*, whose acquaintance he did not make till some weeks afterwards. He denied collusion with any of the Defendants to form a scheme for the purchase of the concession as alleged by the bill, and denied that there was any foundation for the charges of fraud made against him and the other Defendants. As regarded the *Oppert* contract he stated that he was under the belief that the contract would be carried out, and it was on that account that he voted in favour of the deferred payment, and, so far from having any suspicion that the contract would not be carried out, he shortly afterwards purchased 156 shares in the company (being part of the 171 shares before mentioned) at an average price of £40 per share, and then took an allotment of the before-mentioned seventy-three shares, and only fifty of these had since been sold by him.

The Defendant *Lonsdale* stated that he had purchased the secretaryship of the company from *H. Parry* for £300. With regard to the application to the *Stock Exchange* for a settling day, the Defendant stated that the 4500 shares were not allotted subject to the condition that they should be accepted in part payment of the purchase-money, or on any other condition, but were allotted simply as having £1 per share paid thereon, and afterwards the remaining £9 per share thereon was set off against an equal

amount of the purchase-money payable to the vendors, without any agreement to that effect having been entered into by or with the company.

The Defendants *Elmslie, Forsyth, & Sedgwick* stated that, so far as concerned *Elmslie* and *Sedgwick*, they had not been engaged personally in the transactions in the bill mentioned, consequently the answer applied principally to *Forsyth*. They stated that they first acted as solicitors for *Lawson & Son* in July, 1869, and for *Hartmont & Co.* about the end of the year 1869, and upon the incorporation of the company they acted as solicitors thereof. They believed that the sum of £39,000 had been expended on the island of *Alto Vela* by *Lawson & Son*, and they believed that, whether the whole of the 10,000 tons of guano had or not been exported during the year 1870, there had been no forfeiture of the concession, by reason of the acquiescence of the Dominican Government. They had received their bill of costs, amounting to £847, from the company for business done since its formation, but it did not include any costs incurred previous to the formation thereof. The sum of 250 guineas, paid to them by *Engelbach & Keir* was not for any bill of costs sent in by them, but was a fee agreed to be paid to them by *Engelbach*.

The Defendant *Ramsden* put in two answers to the bill, which extended to a considerable length, but as he was dismissed from the suit by agreement, it is not necessary to set forth the statements in these answers.

On the 11th of February, 1873, *Lawson & Son* were duly adjudicated bankrupts as individuals and as a firm by the Court of Session in *Scotland*, and the whole of their estates became sequestrated, and the Defendant *Molleson* was the trustee of the sequestrated estate. The Plaintiffs claimed under the sequestration for the sum of £65,000, and £5529 9*s.* in respect of interest thereon. When the cause was heard before the Vice-Chancellor the Plaintiffs' claim had not been adjudicated upon, and was still pending. Eventually the trustee decided against the claim, and the Court of Session, considering the circumstances of the transaction, exonerated the bankrupts, *Lawson & Son*, from the charge of being implicated in the fraud, and affirmed the trustee's deliverance. The case was brought before the House of

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Lords, and on the 20th of June, 1876, their Lordships (the Lord Chancellor, Lord *Chelmsford*, and Lord *Selborne* being present) affirmed the decision of the Court of Session (1).

There was a considerable amount of evidence in the cause, and many of the witnesses were cross-examined.

The cause came on for hearing before Vice-Chancellor *Malins* on the 15th of November, 1875.

Higgins, Q.C., *Davey*, Q.C., and *R. Melville*, appeared for the company.

Glasse, Q.C., and *Terrell*, for the Defendants *Hartmont*, *Begbie*, and *Cockburn*.

Cotton, Q.C., *Westlake*, Q.C., and *Terrell*, for *Elmslie*, *Forsyth*, & *Sedgwick*.

Cookson, Q.C., and *Cope*, for Colonel *Grant*.

Romer, for General *Green*.

Sir *H. Jackson*, Q.C., and *Terrell*, for *Ogle* and *Lonsdale*.

Whitehorne and *Griffith*, for *Engelbach & Keir*.

J. Pearson, Q.C., and *Locock Webb*, Q.C., for *Molleson*.

Higgins, in reply.

The effect of the evidence and arguments sufficiently appear from the judgment.

The following cases were referred to:—*Panama and South Pacific Telegraph Company* v. *India Rubber, &c., Company* (2); *Lindsay Petroleum Company* v. *Hurd* (3); *McKay's Case* (4); *In re Madrid Bank, Ex parte Williams* (5); *Land Credit Company of Ireland* v. *Lord Fermoy* (6); *Parker* v. *Lewis* (7); *Baker* v. *Loader* (8); *Brydges* v. *Branfil* (9); *St. Aubyn* v. *Smart* (10);

(1) 1 App. Cas. 780.
(2) Law Rep. 10 Ch. 515.
(3) Ibid. 5 P. C. 221.
(4) 2 Ch. D. 1.
(5) Law Rep. 2 Eq. 216.
(6) Law Rep. 5 Ch. 763.
(7) Ibid. 8 Ch. 1035.
(8) Ibid. 16 Eq. 49.
(9) 12 Sim. 369.
(10) Law Rep. 3 Ch. 646.

Blair v. *Bromley* (1); *Plumer* v. *Gregory* (2); *Langton* v. *Waite* (3); *Kennedy* v. *Green* (4); *Taylor* v. *Blacklow* (5); *In re European Bank* (6); *Jones* v. *Lewis* (7); *Central Railway Company of Venezuela* v. *Kisch* (8); *Overend, Gurney, & Co.* v. *Gibbs* (9); *Turquand* v. *Marshall* (10); *Overend, Gurney, & Co.* v. *Gibbs* (11); *Joint Stock Discount Company* v. *Brown* (12); *Ernest* v. *Vivian* (13); *Cornell* v. *Hay* (14); *Parker* v. *McKenna* (15); *Royal Bank of Scotland* v. *Cuthbert* (16); *Society of Practical Knowledge* v. *Abbott* (17); *Imperial Mercantile Credit Association* v. *Coleman* (18); *Dunne* v. *English* (19); *Western Bank of Scotland* v. *Addie* (20); *Rawlins* v. *Wickham* (21); *Bedford* v. *Bagshawe* (22); *Charitable Corporation* v. *Sutton* (23); *Ireson* v. *Pearman* (24); *Beadles* v. *Burch* (25); *In re Phœnix Life Assurance Company* (26).

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In this case, which was heard for sixteen days between the 15th of November and the 8th of December last, I was addressed at very great length by a number of counsel—that is, two for the Plaintiff and nine for the various Defendants—and a very long time was occupied in reading evidence and in the cross-examination of the principal Defendants upon their answers, and the witnesses upon their affidavits. The arguments were most elaborate and able, and the examination of those arguments, the perusal and re-perusal of the immense mass of papers in the cause, and the great difficulty of the case, have occupied so much of my time out of

(1) 2 Ph. 354.
(2) Law Rep. 18 Eq. 621.
(3) Ibid. 4 Ch. 402.
(4) 3 My. & K. 699.
(5) 3 Bing. N. C. 235.
(6) Law Rep. 5 Ch. 358.
(7) 2 Ves. Sen. 240.
(8) Law Rep. 2 H. L. 99.
(9) Ibid. 5 H. L. 480.
(10) Ibid. 4 Ch. 376.
(11) Ibid. 701.
(12) Ibid. 8 Eq. 381.
(13) 33 L. J. (Ch.) 513.
(14) Law Rep. 8 C. P. 328.
(15) Ibid. 10 Ch. 96.
(16) Rose's Reports, 462 (Appendix).
(17) 2 Beav. 559.
(18) Law Rep. 6 H. L. 189.
(19) Ibid. 18 Eq. 524.
(20) Ibid. 1 H. L., Sc., 145.
(21) 3 De G. & J. 304.
(22) 29 L. J. (Ex.) 59.
(23) 2 Atk. 400.
(24) 3 B. & C. 799, 813.
(25) 10 Sim. 332.
(26) 1 H. & M. 433.

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Court, that I have been obliged to defer my judgment for a very unusual period of time.

The object of the suit is to recover £65,000 which was paid for the concession of the island of *Alto Vela*, which was the main source of the operations of this company, the sum of £15,000, part thereof, having been paid to Messrs. *Engelbach & Keir*, and for various minor objects.

The principal actors in the transactions involved in this suit are the Defendants *Hartmont*, *Begbie*, *Ogle*, *Engelbach*, and *Keir*, the partners in the firm of *Peter Lawson & Son*, and Mr. *Alexander Forsyth*, of the firm of *Elmslie, Forsyth, & Sedgwick*, who were the solicitors of the company at its formation and for some time after. The Defendants *Hartmont* and *Begbie* were in partnership under the name of *Hartmont & Co.* in 1868 and 1869. Within two or three years of the commencement of the partnership *Begbie* had become a bankrupt, and his estate only paid a small dividend. *Hartmont* gave this account of himself when cross-examined. He is a German by birth, and is of the Jewish persuasion. He carried on business in *Paris* in 1865 under the name of *Edward Hertzberg*. He took the name of *Hartmont* on coming to *England* in 1867, because *Hertzberg* was difficult for the English to pronounce—a difficulty I confess I do not participate in at all. He was a bankrupt in *Paris* in 1867, but he never heard that he was sentenced in *Paris* to two years' imprisonment. He was also declared a bankrupt in *London* in 1869, but the bankruptcy was in effect the same as that in *Paris;* his debts in *France* were from £58,000 to £60,000, and he said he paid 20*s.* in the pound. He did not say when, but of course, as he says so, I assume he did, and probably out of the result of the operations which I shall have to refer to. The creditors under his bankruptcy were about 100. He had only taken an active part in two companies—the *Berlin Phosphate Company* and the *Ruby Mining Company*.

Notwithstanding these circumstances—the bankruptcy in *Paris* in 1867, and in *London* in 1869—he somehow became consul general for *San Domingo* in 1868, a dignity which he seems on all occasions, as well as in these transactions, to have turned to the best advantage. The connection with the disastrous affairs of the *San Domingo* loan is well known. This suit relates mainly

to the sale to the Plaintiff company of the interest of *Hartmont & Co.* in the island of *Alto Vela*, and therefore the mode in which that interest was acquired becomes important. He says in his answer that Colonel *Mendes*, acting as special commissioner of the Government of *San Domingo*, entered into three contracts in *London* with *Hartmont & Co.*, all dated the 1st of June, 1868, one of which was for the negotiation of a loan to *San Domingo*, to the amount in all of £420,000; another was for the concession and working for fifty years of the guano and certain other deposits existing in the island of *Alto Vela*, forming part of the territories of *San Domingo;* and the third was for the concession and working for fifty years of the coal-fields and other mines existing, or which might be discovered, in the peninsula of *Samana*, in the territory of the same Republic; and that by an agreement dated the 1st of December, 1868, between *Hartmont & Co.* of the one part, and *Peter Lawson & Son* of the other part, with a view of carrying the three contracts into effect, *Hartmont & Co.* purported to transfer the three contracts to *Lawson & Son*, and it was agreed that one of the partners in that firm should proceed forthwith to *San Domingo, Alto Vela*, and *Samana*, in company with *Hartmont*, and various detailed arrangements were made for the working of the three contracts by *Lawson & Son;* and it was provided that they should pay to *Hartmont & Co.* on demand a sum by way of commission on each and all of the businesses arising under that agreement and the contracts equal to one-third of the net profits accruing to *Lawson & Son*, and it was thereby provided that the agreement should not be held or deemed to constitute a partnership between the parties.

Henry Graham Lawson, one of the firm, went early in 1869 to visit *San Domingo*, in pursuance of the agreement, and arrangements were then made by which *Hartmont & Co.* contracted with the Republic for a loan of £420,000, and by which the Government finally granted to *Hartmont & Co.* a concession for the term of fifty years of the guano, guanito, or phosphate of lime on the island of *Alto Vela*, and both as between *Hartmont & Co.* and the Government of *San Domingo*, and as between *Hartmont & Co.* and *Lawson & Son*, there were agreements dated the 1st of December, 1868, which took the place of the contracts of the 1st of

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June, 1868, so far as regarded the loan and island of *Alto Vela* respectively. *Hartmont & Co.* then delivered to the Defendant *Ogle* the following letter, dated the 28th of January, 1869 :—

"Dear Sir,—As arranged before Mr. *Hartmont* left for *San Domingo*, it is agreed and understood that, in consideration of the services and assistance you have rendered to us, we are to allow and pay to you, as received by us, a commission equal to 33⅓ per cent. on the profits derived by us out of all our transactions connected with the Government of *St. Domingo* and the concession of *Alto Vela*, *Samana*, &c., and all other transactions connected therewith, either directly or indirectly."

In accordance with this arrangement, the concession which was the subject of a great part of the suit was granted, and dated the 8th of May, 1869. The concession was contained in an agreement in the French language, and was made between, and duly executed by, M. *Curiel*, the Financial Minister of the Dominican Republic, of the one part, and *Hartmont & Co.* of the other part. [His Lordship read the terms of this agreement already set out.]

It was stated by Mr. *H. G. Lawson*, in his cross-examination, that he was much dissatisfied upon his visit to *Alto Vela*, and many of his letters to his partners, which were read, contained expressions of great disappointment at the quantity and quality of guano found in the island. He alludes to it as "this wretched island." It is true he said that he had occasion afterwards to change his mind, as no doubt he had when he found it necessary to establish this company. As to the Dominican Loan, of which *Lawson & Son* were the agents, he admitted that no more than £50,000 ever reached the Dominican Government, and that sum, he says, was paid by means of a loan to his firm by a Scotch bank. He could not say that that sum ever reached the Government, but only that he paid it into the account of *Smith, Payne, & Co.* I am satisfied, upon the evidence, that the firm of *Lawson & Son* carried on their operations in connection with the island, in 1869 and 1870, at a great loss, and that they saw there was no reasonable prospect of their operations being turned to profit; and I am also satisfied that *Hartmont*, *Begbie*, and *Ogle* were well aware of these facts.

In this state of things it was determined to form this company. It is admitted by *Hartmont* that he was well aware that no phosphate of lime was exported till the 31st of December, 1870, but that there had been exported from the island about 2981 tons of a substance known as phosphate of alumina. It must be borne in mind that in that year, 1870, they were bound to export 10,000 tons. He admits that, under the terms of the concession, the Dominican Government had, at the end of December, 1870, acquired the right to annul the concession, on account of the export not having amounted to 10,000 tons; but he says that, in the year 1871, previous to the assignment of the concession to the Plaintiff company, the Dominican Government, with full knowledge of the deficiency in the quantity of exports, received the royalties and export duties on several cargoes of guano, or guanito, exported by *Lawson & Son* from the island. Upon this subject the bill states that phosphate of alumina is not mentioned in the concession, and the Dominican Government contends that the concession did not in fact confer upon the grantees the right of working the deposits of phosphate of alumina, or anything except guano and phosphate of lime, properly and strictly so called.

In the year 1870, Professor *David Forbes* took out a patent for the manufacture of artificial manures by treating phosphates of alumina, which are found to exist in some of the West Indian Islands and elsewhere, in such a manner as to bring phosphoric acid into a state more soluble in water. Other patents were afterwards taken out by *David Forbes* and *Price* for the application and use of phosphate of alumina, by subjecting them to acids, for the treatment of sewage.

In the early part of the year 1871, the Defendants *Hartmont* and *Begbie*, the several members of the firm of *Lawson & Son* and *Ogle*, well knowing that through their default the concession had become and was then voidable and liable to forfeiture, determined to form a joint stock company for the purpose of purchasing the concession from them. For this purpose they entered into communication with *Engelbach & Keir*, and a provisional committee was formed, consisting of the Defendants *Begbie*, *Engelbach*, *Keir*, and *W. L. Grant*, for the purpose of carrying the scheme and design into effect.

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It was a part of the arrangements for the foundation of the company that the Defendants *Elmslie, Forsyth, & Sedgwick* should become the solicitors thereof, and the last-named Defendants, although they well knew that the concession was liable at any moment to be forfeited and declared void, and was of no real value, agreed to concur with and lend their assistance to the vendors and promoters in carrying the scheme and design into effect. It has appeared in the course of this discussion that the Defendant *Keir* was a captain in the army, and I am bound to say that I think upon the whole evidence, whatever I may have to say with regard to the firm of *Engelbach & Keir* will be more applicable to Mr. *Engelbach*, whose business was that of a financial agent, than to Captain *Keir*, who, having been in the army, was very little acquainted with these circumstances. It was then arranged that *Engelbach & Keir* were to have £15,000 as a reward or bonus for promoting or forming this company. The plan adopted was that *Peter Lawson & Son* were to be treated as the vendors of the concession, and *Engelbach & Keir* as the purchasers, and the concession was accordingly assigned to the *Lawsons*. That was done by a deed of the 20th of April, 1871. Messrs. *Lawson & Son* were thus made the ostensible owners of the concession, although they had sold all their interests in it to *Hartmont*, on the 1st of March previously, for a sum of about £12,000, a sum which I am bound to say I do not think *Hartmont* gave because he thought the concession was worth it, but because he thought it was wise to do it with a view to the arrangement he was about to make with regard to the carrying on of this company. A formal contract for the sale to *Engelbach & Keir*, as agents for the intended company, was entered into on the 28th of April, 1871. The terms of this purchase are that *Engelbach & Keir* were to be put forward as the purchasers on behalf of the company, and that the consideration for the sale should be £65,000. With regard to this purchase-money of £65,000, there is not a particle of evidence to shew that any skilled person had ever been consulted to give an opinion as to whether the concession was of any value or not. No opinion of that sort was obtained, but the provisional committee having been formed for experimenting with *Forbes's* patent, without any further investigation this is agreed to: "The consideration for the sale should

be £65,000, which should be paid thus: £20,000 in fully paid up shares; £45,000, the remainder thereof, in cash, to be paid upon the completion of the sale; such parts thereof to consist of fully paid-up shares," and so forth. "The vendors had delivered to the purchasers copies of all the documents of title shewing their right to the concession, and had produced to the purchasers' solicitors, who had examined the same, all the original documents of title; and the purchasers, by the now stating agreement, testified their acceptance of the vendors' title thereto." Before this contract was entered into, the provisional committee was appointed, consisting of the promoters of this company—that is, of those I have described as the principal actors in it, and also Colonel *Grant;* and the object was, by experimenting on the materials obtained from *Alto Vela* with the patents of *Forbes* and *Price*, to satisfy the public that the material operated upon by that patented process would be of enormous value. There was no corrective power there except Colonel *Grant*, who, as I understand, is a gentleman of high military position, a colonel in the Guards, a gentleman whose conduct, I desire to say, is not seriously impeached in these transactions. But there was no person, other than the promoters of the company, exercising any discretion, or watching the proceedings to see that it was all *bonâ fide;* it was, in fact, done by these men, whose object it was to establish this company. On the 21st of April they had an addition to their number in the person of General *Green*, who was the uncle of Mr. *Lonsdale*, the secretary; he is a gentleman who has long served in *India*, and has lived in retirement until, unfortunately, his attention was called to this company, and I think he was no more competent to test these experiments than his companion, Colonel *Grant*. During these proceedings, beginning in January and ending in April, an abstract of title of the concession was delivered to the Defendant *Ramsden*, who acted as the solicitor of *Engelbach & Keir*, as if they had been *bonâ fide* purchasers having a real interest in investigating the title. The abstract was laid before counsel, who was of course ignorant of the nature of the transactions, and he, on the assumption that a real and honest purchase was intended, made very proper requisitions.

Before I refer to these requisitions I will first state the position of the parties. *Elmslie & Co.* delivered the abstract as the solicitors

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of *Peter Lawson & Son*, who were treated as vendors though the concession, as I have stated, belonged wholly to *Hartmont*. *Elmslie & Co.* were also the solicitors of *Hartmont*, *Begbie*, and *Ogle*, and they were the solicitors of the intended company, and were well known by all the parties to be so. If *Engelbach & Keir* took and sustained any objection to the title they would lose £15,000, and this I think the most material turning point in the case; but if they overlooked objections and accepted the title they would get that sum. The vendors, whether they were the *Lawsons* or *Hartmont*, *Begbie*, and *Ogle*, had therefore agreed to give the nominal purchasers a bribe of £15,000 to overlook any objections to the title and accept it. It is extraordinary that Mr. *Forsyth*, who knew all the facts, should have allowed himself to appear as the solicitor of the vendor only—for that was the character in which he carried on the negotiations—when he was really the solicitor of the purchasers, the company. The employment of Mr. *Ramsden* as solicitor for the purchasers I consider as merely colourable. The course taken by the learned counsel, Mr. *Whitehorne*, was highly honourable to him. He was ignorant of the real transactions, and made these requisitions on the title long before the formal contract of the 28th of April. Mr. *Whitehorne's* opinion begins: "I understand that Mr. *Ramsden*, who instructs me, is not to be the solicitor for the proposed company when formed, and that, therefore, I advise on this title simply on behalf of *Engelbach & Keir*, and in order to enable them on entering into the contract for purchase with Messrs. *Lawson & Son*, on behalf of the proposed company, to treat the title as accepted instead of contracting for the delivery of an abstract. As Messrs. *Engelbach & Keir*, therefore, are merely trustees or agents for the company proposed to be formed, and as Mr. *Ramsden* is their solicitor exclusively and not the company's, the contract must be entered into, expressly subject to the approval by the company, within a given time after its formation, and in default of such approval to be void. The title shewn consists only of two documents—the notarially verified translation of the original concession of the 8th of May, 1869, and the agreement to sign it of the 21st of December, 1870. Evidence should be given that the island of *Alto Vela* belonged to the Government of the Dominican Republic on the 8th

of May, 1869, and not to any private owner, and that its title thereto was not then, and has not since been, disputed either by foreign powers or by any hostile authority."

Now, Messrs. *Elmslie & Co.*—that is, Mr. *Forsyth*, who is the only member of the firm who took any part in these transactions—these being requisitions of title on behalf of intended purchasers, might have been expected to attend to the difficulty raised, and take care that his intended clients should have apparently a good title; but what did he do? All this time, being the solicitor of the real purchasers—the company—he was also the solicitor of the vendors. It was impossible that he could perform his duties to both parties, and this was his answer to that requisition: "This is an impossibility, and we submit that it is a most unreasonable requisition." This is the man who really represented the purchasers.

Then the fourth requisition is a very material one: "Satisfactory evidence must be given that the 3rd article has been fully complied with. If not, as the Government of the Dominican Republic has, under article 7, a right to avoid the concession on non-performance of article 3 by the concessionnaires, a waiver must be obtained from the proper authority, which must extend to the time when the company is ready to take possession." Now, if this had been a *bonâ fide* transaction, what would Mr. *Forsyth* have done, who received these requisitions and knew that the public were to pay for this concession no less a sum than £65,000. Here is a difficulty suggested by the learned counsel. What would any man acting in a proper spirit do? He would have said, This is too doubtful a thing; I must be satisfied that the Dominican Government bind themselves for a longer time not to take any advantage, in order that the purchaser may be better protected. But what is the answer?—"The vendors, who are now daily shipping guano from *Alto Vela*, will enter into the usual covenants for title." So that people are to pay £65,000 for a thing which has apparently a bad title, and to rely upon a covenant for title.

Then the fifth requisition is: "Who are the contractors for the loan mentioned in article 7, and how much of it now remains unpaid? Evidence must be given on the latter point; it would be by far the simplest and best plan if the Dominican Government

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would grant a new concession to the company when it is founded, *Hartmont & Co.* and *Lawson & Co.* joining to confirm." This is the answer: "We cannot see that this inquiry is relevant. The loan has obtained settlement and quotation on the *Stock Exchange.* The remaining portion of this requisition is an impossibility." The loan was one of the most fraudulent loans that ever was brought before the public, and has brought disgrace on every person concerned in it. This is the protection they afforded their clients: instead of availing themselves of the objection taken they make such an answer as that. This is the farce gone through as if between vendor and purchaser. The answer of *Engelbach & Keir* on this subject is somewhat remarkable. They are supposed to be representing persons who were to pay for this concession the sum I have mentioned. *Engelbach* makes this statement: "The Defendant *Ramsden* (that is, their own solicitor) fully explained to me the nature and object of the requisitions, and urged on me the importance of having them fully answered; I thereupon went to the Defendant *Ogle* (that is, one of the confederates of *Hartmont*) and informed him of the view which my solicitor took in the matter, and he in reply assured me that the title to the concession was good, and promised me that every reasonable information should be given. I therefore returned to *Ramsden* and told him the result of my interview with *Ogle*, and instructed him to proceed with the agreement pending the return of answers to the requisitions. Shortly afterwards, being very desirous that there should be no unnecessary delay in completing the purchase, I accompanied *Ogle* to the office of *Forsyth* for the purpose of ascertaining what progress had been made. The Defendant *Forsyth* then assured me that the title to the concession was perfectly good, and that, with regard to the 10,000-ton clause in the concession, large shipments had been made, and that in no case could any difficulty arise in respect thereof. He and *Ogle* both stated that *Hartmont*, as the Consul General of the Government (a position which he has made use of on all occasions), was able and willing to procure from the Government any ratification of the concession in favour of the company which might thereafter be thought necessary, and they both urged that covenants for title by a firm of such high standing and credit as the Messrs. *Lawson & Sons* were an ample

security to my firm in accepting the conveyance, without insisting on full answers to the requisitions, as they would necessitate inquiries in *San Domingo*, and consequently delay, which would be most prejudicial to the interests of the company. The Defendant *Forsyth* added that the vendor would give the amplest covenants for title, including a covenant that the concession was neither void nor voidable." Then he says: "After carefully considering these statements, and in the true and honest belief that the representations of the Defendants *Ogle* and *Forsyth* were true, and that by insisting on requisitions which would or might necessitate a communication with *San Domingo* much delay would be caused in the formation of the company, we came to the conclusion that we might, in the exercise of due prudence and caution, rely on the assurance so given to us and accept the title offered us as satisfactory, and we accordingly determined on our own responsibility to accept the statements of the Defendants *Ogle* and *Forsyth* as sufficient and satisfactory, and accordingly instructed our solicitor, Mr. *Ramsden*, that we were willing to take the responsibility, and desired him to waive further requisitions and to proceed to settle the agreement for purchase without delay." Now, here there is a most extraordinary statement: "Our position in the matter being that of merely formal and temporary purchasers, we were willing to waive our own strict rights; we were induced to act in this manner on account of the high and long-established standing of Messrs. *Peter Lawson & Sons*, and the position of the Defendant *Hartmont* as Consul General of the Dominican Republic, and of the fact that the solicitors for the vendors were also to be the solicitors for the company and treated their title to the concession as good; and had already actually accepted the title as good for Messrs. *Peter Lawson & Sons* when they purchased the concession."

It is clear from this that if Messrs. *Engelbach & Keir* had been liable to pay £65,000 of their own money for the concession, they would never have thought of accepting the title, and it is equally clear to my mind, that if Mr. *Forsyth*, instead of being at once the solicitor for the vendor and purchaser, had represented the latter only, he would never have allowed his client to accept such a title or to buy a property which he ought to have known had no com-

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mercial value whatever. The recommendation to rely upon the covenants for title of Messrs. *Lawson & Sons* was most unusual and improper. That firm had long been one of high repute, but it turns out (though I hope unknown to Mr. *Forsyth*) that they were then overwhelmed with difficulties, and they failed in February, 1873, and have only paid, as I understand, a dividend of about 2*s.* in the pound, and are not likely to pay anything more. The title ought to have been rejected, and the subsequent disasters would then have been avoided, but that course would not have suited the views of the parties engaged.

The title having been thus accepted, Mr. *Forsyth* proceeded to prepare the memorandum and articles of association, which are dated the 1st of May, 1871. They are for a double object. The capital of the company was to be £240,000, the first issue to be £120,000, and it was "to adopt and carry into effect certain articles of agreement dated the 6th of January, 1871, and made between *David Forbes* and *A. P. Price* of the one part, and *F. W. Engelbach* of the other part, and also a memorandum of agreement dated the 29th of April, 1871." That was the concession of *Alto Vela.* The company was registered on the 6th of May, 1871, and the prospectus was afterwards issued for the usual purpose of inducing the public to apply for shares in the company. At that time it appears to have suited Mr. *Hartmont's* views to keep very much in the background. He admits in his answer that he returned to *England* in January, 1871, and it has been proved that he, *Engelbach*, and *Ogle*, and *Lawson*, all carried on the same business in the same house, in *Budge Row, Cannon Street;* that he was always represented by *Ogle* in these transactions, and did not personally take part in them, though he admitted in his cross-examination that he saw *Ogle* daily, and many times on some days, and his name does not appear in the prospectus as a director, for reasons, I think, which are sufficiently obvious. It was, no doubt, felt that his name could not be attractive, considering he had been a bankrupt in *Paris* in 1867, and in *London* in 1869, and that was, no doubt, the reason why the *Lawsons* were put forward as the ostensible owners of the concession, in which at that time they had no interest. He nevertheless became the chairman of the company two months after its formation, and

continued to be so until November, 1873, when it got into a state of disastrous ruin, the undertaking having entirely failed, and the shares having fallen from £55 and £60, to which they had been raised by the dishonest proceedings of *Hartmont* and those associated with him, down to £2 and £3 in the market.

The prospectus states the first issue to be £120,000, in 12,000 shares of £10 each, of which £35,000 are represented by vendor's fully paid-up shares, and 2000 having already been subscribed for, the balance of 6500 was offered to the public. The directors were *T. H. Cockburn*, Colonel *Grant*, Major-General *Green*, Mr. *Harrison*, Mr. *Keir*, of the firm of *Engelbach & Keir*, and Mr. *H. G. Lawson*. The bankers were the *Consolidated Bank*, and the brokers Messrs. *Walker & Lumsden*.

[His Lordship then read the material portions of the prospectus.]

Now with regard to the expenditure of £39,000, there is the evidence of Mr. *Kell*, the engineer. He says he was out in the island some time with Mr. *Lawson*, and when he left the island in July, 1870, he should say that between £3500 and £4000 had been spent in plant and materials and stores on the island, including freight from *New York* of the same. Here is a man who knew more about it than any one else, who says it ought to be stated at £3500 to £4000, but the prospectus states it at £39,000. I am aware there is conflicting evidence, particularly on the part of Mr. *Molleson*, the trustee of *Lawson's* estate, by which it is attempted to shew that it amounts to £39,000, but that, I think, is completely erroneous. The prospectus would have been more correct if it had stated that *Lawson & Son*, in connection with the island, had lost £39,000. The items of expenditure, making up what they allege was £39,000, are shewn in the exhibit book, and altogether they amount to £35,603; amongst those items I see items such as demurrage, and other items which to any person acquainted with the affairs of the world would shew that there had not been £39,000 expended, as the prospectus implies, in a profitable manner upon the island. This statement as to the £39,000 expenditure seemed to have caused some anxiety on the part of the directors, and Mr. *Forsyth*, being applied to on the subject, gave his assurance that he had documents which came into his possession previous to the formation of the company that shewed the

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truth of that statement. That took place at a board meeting of the directors on the 22nd of May, 1871. This was most incautious and unjustifiable on the part of Mr. *Forsyth*, who must have known that any statement of his would most materially influence the conduct of those to whom it was made. The Plaintiffs' counsel have perhaps not gone too far in saying that if Mr. *Forsyth* had more properly performed his duty, this unfortunate company would never have been formed.

In consequence of the issuing of the prospectus, 8606 shares were in due time applied for, and 8107 were allotted, but of those 4500 were to be fully paid-up shares taken by the directors and their friends, leaving only 3607 shares to be taken by the public; so that for raising or procuring £36,000 of capital Messrs. *Engelbach & Keir* were paid a bonus of £15,000, besides the ordinary commission paid in such transactions, which was paid to them as if they had not had the £15,000 bonus at all. With this limited amount of capital the directors most unfairly resolved to proceed with the operations of the company. The concession was assigned by *Lawson & Son* by an indenture dated the 29th of May, 1871. That deed states, contrary to the fact, that the sum of £45,000, part of the purchase money of £65,000, shall be paid in cash, and that the sum of £20,000, the residue thereof, shall be paid in 2000 fully paid-up shares of £10 each.

Now, let it be remembered that *Engelbach & Keir* say that the *Lawsons* would enter into covenants for title, and not only absolute covenants for title, but covenants that the concession was neither void nor voidable. It is remarkable that *Forsyth*, having given that assurance, when he comes to settle the deed takes care of his clients, the *Lawsons*, by making them enter into a common covenant for title against their own acts only. The words are, "Notwithstanding anything by them, the vendors, or any of them, done, omitted, or knowingly suffered, the said contract or concession is now a good, valid, and subsisting concession, and is in no wise void or voidable."

So that there is no absolute covenant for title, but merely an ordinary covenant that through their own acts the concession was not void or voidable. Then there are several board meetings of the directors, at which Colonel *Grant* was in the chair, and the

directors present were a general, a retired colonel in the Indian Army, a retired colonel in the Guards, and a retired captain on half pay. Those are the gentlemen who were to protect the interests of this great commercial concern. It is no great disrespect to them to say that they knew as little of commercial matters as any gentleman engaged in this case, or myself, know of military affairs. At one of these meetings, held on the 31st of May, 1871, there is this material statement: "The solicitor of the company assured the board of the validity of the transfers, and of his possessing a receipt in full for all demands, and it was thereupon resolved that fully paid-up share certificates representing £45,000 might be issued to the representatives of Messrs. *Lawson & Son* and Mr. *Ogle*, who had previously presented authority to receive the same." Accordingly the shares were so transferred with further shares, making up £65,000.

Shortly after the 31st of May, namely, the 15th of June, an application was made to the *Stock Exchange* for a settling-day. Mr. *Lonsdale*, the secretary, accordingly wrote this letter to the secretary of the *Stock Exchange*:—"Dear Sir,—In connection with an application to the committee of the *Stock Exchange* to allow a settling-day and quotation in the shares of the *Phosphate Sewage Company, Limited*, I beg to forward to you the following documents, namely, a certified copy of the prospectus and date when first advertised, two copies of the memorandum," and so forth. Then he enumerates the various documents which were to comply with the requisitions of the *Stock Exchange*; this is accompanied by a certificate signed by Colonel *Grant*, the chairman, and Mr. *Lonsdale*, the secretary, certifying that in this company there were applied for by the public 8606 shares, as the original first issue was to be £120,000 (just turning over the corner of two-thirds, which would be the requisite number). "That 8107 shares were unconditionally allotted, on which £4053 10*s.* has been paid on application at ten shillings per share, and £4053 10*s.* on allotment, being at the same rate on 8047 shares, or £1 per share. Sixty shares have not yet been paid on allotment. No shares have been conditionally allotted."

It seems by this letter, signed by Colonel *Grant*, the chairman, and Mr. *Lonsdale*, the secretary, that the *Stock Exchange* was im-

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posed upon. It has been said that they exist only for the purpose of being imposed upon by companies of this sort by such statements. Accordingly a settling-day was granted. The secretary of the *Stock Exchange*, Mr. *Levien*, has stated in his affidavit that by their rules the committee will order the quotation of a new company in the official list, provided the company is of a *bonâ fide* character and of sufficient magnitude; that two-thirds of the shares (those reserved or granted in lieu of money payments to concessionnaires, owners of property, or others not being counted in such two-thirds) have been applied for and unconditionally allotted; that the articles of association restrain the directors from employing the funds of the company in the purchase of its own shares; and provided that a member of the *Stock Exchange* is authorized by the company to give full information as to the formation of the undertaking and the application for and allotment of shares. It is very material to observe that it is required, most properly, by the *Stock Exchange* that the directors should be restrained from employing the funds of the company in the purchase of its own shares. It should also be understood that it is utterly inconsistent with the position and duties of the directors to deal in shares of companies in which they are directors. Then Mr. *Levien* says: "If the committee of the *Stock Exchange* had been informed that 4500 shares, part of the 8107, had been allotted to nominees of the vendors, and that they had been issued as fully paid up in payment of so much of the purchase-money of the property sold as was to be taken in cash, and in addition to the shares representing so much of the said purchase-money as was to be taken in shares, I am decidedly of opinion that they would not have granted the settling-day." The bill then says that the settling day having been obtained, the Defendants proceeded to operate in the shares of the company on the *Stock Exchange*, and succeeded in raising the price of the shares to a very large premium. By the evidence it appears that the £10 shares by these contrivances had in 1871 got up to £20, but in January, 1872, they got to £26 a share, and afterwards to £30, and in March, 1872, they had been run up to £40 a share, and the traffic in shares by *Hartmont* and others was enormous, probably unparallelled in any company. The ledger of the company shews the following result as to the

dealing in the company's shares during the years 1871 and 1872:— *Hartmont* transferred into his own name 5412 shares, and transferred out of his name 5330, there having been only 8606 in existence. But that is not all, because I see *S. Y. Montefiore*, clerk to the Defendant *Hartmont*, had in his name 1038 shares, and transferred into his name 1038, and *Thomas*, another clerk of *Hartmont's*, had 136 shares and sold 128. *Begbie* had 1017 and sold the same number. Mr. *John Ogle* had 2321 and sold 2316. All the other parties had shares varying from 1000 to 60 and sold about the same number. So that *Hartmont* sold in fact nearly as many shares as the whole number issued by the company. This was the state of the share list in 1872, when the price had been got up to £40 a share. They continued rising till the 15th of March, when they got up to £56 for reasons which I will now state. The thing was from the beginning utterly worthless, and you might as well have given £40 for a broomstick as for a share in this company; but some people are never satisfied, and accordingly this extraordinary transaction takes place. *Hartmont* (and in making this statement I desire to confine myself to *Hartmont* only, because I do not think there is any satisfactory evidence to shew that it was any one but *Hartmont* together with *Oppert*) brought forward a firm of *Oppert & Co.*, and the bill states it thus:—"In order further to raise the price of the shares in the Plaintiff company, the Defendant *Edward H. Hartmont* (who had then become a director and the chairman of the company) induced his co-directors to authorize him to enter into a contract for the sale of the patents for using the company's process in *France*, and he accordingly purported to make a contract, dated the 6th of March, 1873, on behalf of the Plaintiff company, for the sale of the said French patents to two persons, named *Oppert* and *Josephson*, who were carrying on business in *London* under the name of *Oppert & Co.*, for £250,000, payable £4000 in cash, £46,000 within six months, and the balance of £200,000 within twelve months." This was a magnificent thing. Here is a company with only £120,000 nominal capital, the real capital being only £80,000, and here are parties brought forward to give £250,000 for the right of working the company's process in *France* alone, and if that was true what was not the value of these shares?

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Now the facts with regard to this contract, as appears by the evidence, were these: On the 21st of January, at a special board meeting of the directors, *Hartmont* was authorized to enter into negotiations for the sale of patent rights of the company in *France*. On the 22nd of February, at another board meeting, a draft of the proposed contract with the parties who were in negotiation on the subject was submitted by Mr. *Forsyth*, and was approved by the board. On the 8th of March a proposal was made by *Oppert & Co.* to purchase the patent rights of the company for the whole of the Republic of *France* for a sum of £150,000, cash down, or to pay £250,000 in twelve months. This offer was of enormous value if it were a genuine thing; and being a matter of so much importance a meeting of the shareholders was summoned, which took place on the 15th of March. At this meeting a speech was made by Mr. *Hartmont*, in which he said it was his own firm conviction that the contract, if entered into, would be carried out to the full extent. A more false statement than that was never made by any man. Then he goes on: "It was only entered into after thorough investigation"—false again —"and examination of this company's process by the highest scientific authorities in *France;* he did not conceal from himself the fact that the political circumstances of *France* were such that it might possibly be desirable for the shareholders to accept the £150,000 instead of a quarter of a million, with the payment extending over twelve months, but the directors would leave the shareholders to decide which they would accept." The chairman then said, as it was a matter of so much magnitude, the shareholders should have time to consider the alternative propositions. A poll was then demanded, and was fixed by the chairman to take place on the 25th of March, that is, in ten days time. This was a master-stroke for an enterprising man like *Hartmont*. The magnificent offer of £250,000 became known, and the price of the shares rose from £40 to £56 on the 18th of March, and on that day *Hartmont* sold a thousand shares in the company for £56,000. This is proved by the cheque of the brokers, which is in evidence. Whether it was out of this money, or other money obtained in the same way, that he paid his creditors in the bankruptcy the 20*s.* which he swears he did, I do not know.

On the 25th of March the ballot took place, and then *Hartmont*, who at the meeting of the 15th had recommended the acceptance of the immediate payment of £150,000, instead of the deferred one of £250,000, not only himself voted, but required all his nominees and trustees to vote for the deferred payment of £250,000; and a resolution was passed authorizing the directors to accept the deferred payment of £250,000. This resolution was carried by an overwhelming majority—there having been 1045 shares for the immediate payment, and 3327 for the deferred payment. I am very glad to find among the minority the names of Colonel *Grant* for 200 shares; Mr. *Cockburn* for 80; Mr. *Ramsden* for 62; Mr. *Walker*, the broker, for 320; and Mr. *Keir* for 194. Those who voted with *Hartmont* included *Ogle*, 150; *Begbie*, 280; *Hartmont*, 1837; *Green*, 525; *Forsyth*, 200 shares. Therefore *Hartmont* and his nominees carried it by an overwhelming majority on the 25th against the advice he had given on the 15th.

Now Mr. *Oppert* has given evidence to this effect: that *Hartmont* had business transactions with their firm, and was entitled to a share of the profits in consideration of a sum of money which he had advanced to and had in their firm. He understood from *Hartmont* that certain eminent persons in *France* were taking an interest in this company, and that he was acting on their behalf. It was in consequence of what *Hartmont* said that they entered into the agreement to purchase the company's patent rights. The deposit of £4000 was paid by their firm and debited to *Hartmont*. The object of this was clearly to give *Hartmont* an opportunity of continuing his operations in the shares, and obtaining from the public enormous prices for the shares which he knew to be practically worthless. But it turned out that this *Oppert* contract was a mere sham. There were no persons in *France* desirous of purchasing the patent, and there were no influential persons connected with the offer whose names could be disclosed. *Oppert & Co.* were a small financial firm who failed in the following spring, in which *Hartmont* himself was a partner. The deposit of £4000 was supplied by *Hartmont*, and bills for £10,000 were procured and guaranteed by him. The letter of the 8th of March, 1872, sent by their firm to the company, was suggested by *Hartmont*,

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who informed them that the £150,000 would be paid by the eminent French gentlemen alluded to.

The deposit, therefore, was paid by *Hartmont*, and the whole thing was a base fraud. Probably the annals of joint-stock companies will not afford a more flagrant instance of fraud than this *Oppert* contract with *Hartmont*. It is only due to the directors to say that I believe they had nothing to do with it, but they had not the excuse of the rest of the shareholders, because a little vigilance on their part, and common sense in managing the affairs of the company, would have protected them against such a monstrous improbability as this was.

Soon after this the price of the shares began to decline. I have shewn that *Hartmont* sold them at £56, but at the end of March they were down to £42, and at the end of the year 1872 they were down to £5 7*s.* 6*d.*, and when the bill was filed in the following April they were £2 or £3, if they had any market value whatever. During this time the importations of material from *Alto Vela* had gone on very languidly, the business of the company was very unprofitable, although sums amounting in the whole to £44,000 I think, including the *Oppert* transaction, which was £14,000, were obtained from various places, principally from abroad.

The Dominican Government became dissatisfied with the proceedings of the company, and on the 4th of October, 1872, that is about a year and a half after the formation of the company, or a little more, the company, by its secretary, received this letter addressed to the secretary, and signed by Colonel *Mendes*, the agent of the Dominican Government, from whom the contract had been originally obtained.

[His Lordship read this letter, which has already been set out, and also the enclosure, which was a copy of the letter previously addressed to *Hartmont*, in which the concession was declared by the Government to have been forfeited, and which letter *Hartmont* concealed from his co-directors.]

These letters, therefore, were a determination of the grant; they in fact, revoke the concession of the 8th of May, 1869, and thus the thing for which £65,000 had been given only twenty months before, came to an end. I am aware, as Mr. *Glasse* pointed out to

me, that by books issued by the authority of the Dominican Government, one of which was published in March, in the spring of 1871, they then mentioned the concession as being in force. I think it very likely, as the letter of Colonel *Mendes* says, that they were ready to open fresh negotiations, and I have no doubt if the company had been honestly constituted and properly conducted, that things might have been arranged, and that the difficulty with regard to the concession might have been got over. Still, the company having thus become a complete failure, the shareholders, many of whom had bought their shares at high prices, brought about by the contrivances to which I have referred, naturally became dissatisfied. *Hartmont* sent in his resignation as director in 1872, and others following his example, the company virtually came to a break-up, and the usual course of appointing a committee of investigation followed in 1872, and the institution of this suit in April, 1873, is the result.

That the operations of the company have been disastrous, admits of no doubt. The bill contains statements, which although they may be correct as regards some of the directors, I am bound to say are overcharged with regard to others. I stated, it may be remembered, in the course of the argument, that it would probably turn out in the end that some of the directors were victimisers and others were victimised, and I am still of that opinion to a certain extent. But the bill, without discriminating, makes this statement.

[His Lordship then read the charges in the bill, that previously to the execution of the indenture of the 20th of April, 1871 and the agreement of the 28th of April, 1871, the members of the provisional committee and their solicitor, *Ramsden*, and the *Lawsons*, well knew that 1981 tons only had been exported from the island in 1870, and the concession was then voidable, and also that it was doubtful whether alumina was comprised in the concession. Nevertheless they all combined and colluded together to conceal these facts from the persons who might become shareholders in the company. In fact, the object and scheme of the Defendants was to obtain the control of a large number of shares in the company, and afterwards to obtain a settling-day on the *Stock Exchange*, and by speculating and trafficking in such shares to make large profits for themselves.]

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Upon those statements the relief sought by this bill was rested by the Plaintiffs upon these grounds. First, the concession was voidable, and the title to it ought not to have been accepted. Secondly, at all events it was so doubtful that it ought not to have been the subject of a sale. Thirdly, that it was improper to represent the *Lawsons* as the vendors when they had not the least interest in the concession. Fourthly, that the purchase-money was improperly increased by the payment of £15,000 to *Engelbach & Keir*. Fifthly, the concession had no commercial value when it was sold to the company. I am of opinion that all these objections are sustained. It is clear to my mind that though it is probable, if this had been an English contract, that the grantors would have been precluded from taking advantage of the forfeiture by allowing the working to go on after it occurred, that was too slender a ground to rely upon between the grantors and a foreign government not bound by such rules. The title, therefore, ought not to have been, and would not have been accepted if the parties had been actuated by proper motives, and had only desired fairly to protect those who might become shareholders in the company. I am of opinion that putting forward *Engelbach & Keir* as purchasers, and giving them a bribe of £15,000 to accept the title, was fraudulent, and of course that could not have been adopted by persons actuated by honest motives.

It was urged on the part of the Plaintiffs that the concession did not comprise phosphate of alumina, and that it was fraudulent on the part of the promoters to represent it as comprising that substance; but I think it clear that all parties considered it was comprised in the words "guano, guanito, and phosphate of lime," and the opinion of Mr. *Macadam*, a very skilled and scientific man, justified them in having entertained that opinion, and there is also the report of another gentleman to the same effect. I am satisfied that the opinion of these gentlemen justified them in entertaining that belief. It is also clear that the government allowed the exportation of phosphate of alumina in January, 1874. I am therefore of opinion that the charge of fraud on this ground entirely fails. It was contended by the Defendants, and particularly by Mr. *Glasse* for the Defendant *Hartmont*, and Mr. *Cookson* for the Defendant Colonel *Grant*, that the company cannot sue for a

wrong like this; that it was a fluctuating body, and it may be that no person who was a member at the time of these transactions is so now; but I think I am bound to consider the company as a body having a perpetual existence, and I am not at liberty to go into the question of what individuals it is composed. It has been settled ever since the case of the *Charitable Corporation* v. *Sutton* (1), which was before Lord *Hardwicke*, that a corporation can sue its directors or other persons for a breach of duty towards it. The *Society of Practical Knowledge* v. *Abbott* (2) and the late case of the *Morvah Mining Company, McKay's Case* (3), are instances of this; and also *Overend, Gurney, & Co.* v. *Gibb* (4), a case so frequently cited. No doubt was raised by Lord *Hatherley* in the Court of Chancery, or by the House of Lords, as to the right of the company in that case to maintain the suit against the directors if they had been charged with fraud or gross negligence; the demurrer was there allowed, but allowed solely because they did not charge gross negligence. If they had charged fraud, the demurrer would have been overruled instead of being allowed. There was something thrown out by Lord *Westbury* which I think no other Judge concurred in, and therefore I must take it as not being well founded. The recent case of the *Lindsay Petroleum Company* v. *Hurd* (5) is a remarkable instance of such a suit as this being sustained by a company, and that case was very much relied upon by the Plaintiffs' counsel, and is remarkably in point. I do not rely upon such cases as the *Joint Stock Discount Company* v. *Brown* (6), or the *Land Credit Company* v. *Fermoy* (7), and the *Panama Case* (8), because they were all cases of the misapplication of the funds of the company, for breach of duty towards it after its formation, and not in its formation. I am therefore of opinion that the company can sustain such a suit as this.

Upon the whole case I am of opinion that the Defendant *Hartmont*, and the estates of *Begbie* and the *Lawsons* are jointly and severally bound to restore to the Plaintiff the price paid for the concession, and that the Defendants *Engelbach & Keir* are liable

(1) 2 Atk. 400.
(2) 2 Beav. 559.
(3) 2 Ch. D. 1.
(4) Law Rep. 5 H. L. 480.
(5) Law Rep. 5 P. C. 221.
(6) Ibid. 8 Eq. 381.
(7) Law Rep. 5 Ch. 763.
(8) Ibid. 10 Ch. 515.

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to restore the £15,000 which was paid to them for the purposes and in the manner I have already stated. There must be a decree accordingly. *Hartmont* will be liable, but whatever is paid by one will be in mitigation of the amount to be paid by the other. In the case of the *Morvah Mining Company* it was a proceeding against the officers of the company under the 165th section of the Act. That is a summary proceeding; nothing, I apprehend, could be done under that section against an officer of the company which could not be done by a bill. There the decision of the Court of Appeal was this:—*McKay*, an active promoter of a mining company, signed a contract on behalf of the intended company for the purchase of certain property under the terms of which part of the purchase-money was to be paid in fully paid-up shares. In this case *Keir* became a director of the company, and is put forward as the agent of the company from the beginning, and signed the contract as the agent of the company. *McKay* became secretary to the company on its formation, and while he held that office the fully paid-up shares contracted to be paid in respect of the purchase were allotted to the vendor, who thereupon transferred 600 of them to *McKay* in pursuance of a secret agreement entered into prior to the existence of the company. *McKay* alleged that he held these shares merely as a trustee for another promoter. After *McKay* had ceased to be the company's secretary, the company was ordered to be wound up, at which date *McKay* retained 500 of the shares transferred to him by the vendor. The official liquidator proceeded against him in the Stannaries Court for a misfeasance under the 165th section of the *Companies Act*, 1862. I have already said that what can be done by summary process may, in my opinion, also be done by bill—and the Vice-Warden ordered him to pay the full value of the 500 shares, and expressed his opinion that the official liquidator might have settled him on the list of contributories in respect of 500 unpaid shares. On appeal by *McKay*, it was held that, without determining whether or no the shares in question were to be treated as unpaid shares, *McKay*, while an officer of the company, had been guilty of a misfeasance in respect of which he must pay damages, and that as the shares taken by him might have been allotted to solvent persons, the full nominal value of

the shares was the proper measure of damages. Accordingly he had to pay the full amount, and I think that is very applicable to the present case, particularly as regards *Engelbach & Keir*.

The case made against Messrs. *Elmslie, Forsyth, & Sedgwick* has given me much anxiety. With regard to *Elmslie & Sedgwick*, so far as they are liable, they are so because one partner is answerable for the acts of the other in the ordinary course of partnership business, and the business of this company appears to have been wholly conducted by their partner Mr. *Forsyth*. It was hardly necessary to cite authorities to shew that *Elmslie & Sedgwick* are answerable for the acts and omissions of Mr. *Forsyth*, but the cases of *Blair* v. *Bromley* (1), *Brydges* v. *Branfil* (2), *St. Aubyn* v. *Smart* (3), and *Plumer* v. *Gregory* (4), the two last being decisions of mine, affirmed on appeal, were cited, and they are conclusive upon the subject. I cannot help feeling strongly that Mr. *Forsyth* committed a great error in being concerned for the vendor and purchaser in such a case as this, and also for so many other parties who had adverse interests to the company, whose officer he was, and I feel the force of the point which was so much pressed upon me by Mr. *Higgins* and Mr. *Davey* that if Mr. *Forsyth* had properly discharged his duty the company would probably never have been formed, and also that his incautious statement as to the expenditure of the £39,000 on the island had a material influence in giving a misplaced confidence to the directors and others engaged in the company. Still, though there is so much to blame, I think there was no fraudulent intention on his part, and I am unable to come to the conclusion that he has rendered himself liable to the extreme demand which is made against him in this suit. Nor can I treat this as an action for negligence. It was decided by Vice-Chancellor *Hall* in the *British Mutual Company* v. *Cobbold* (5), that a bill could not be sustained against a solicitor for negligence. At that time it was the proper subject of an action at law, but under the new procedure it can be sustained in this Court as well as in any other Court, because we are now all one Court. But I think this being

(1) 2 Ph. 354.
(2) 12 Sim. 369.
(3) Law Rep. 3 Ch. 646.
(4) Ibid. 18 Eq. 625.
(5) Law Rep. 19 Eq. 627.

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a bill set down for hearing before the *Judicature Act* came into operation, I am bound to treat this as under the rules applicable at the time when the cause was set down. Therefore I concur with the view of Vice-Chancellor *Hall*, and say, I am unable to treat this as an action for negligence, and on that ground I cannot fix the firm of *Elmslie & Co.* But upon the principle I acted upon in *Baker* v. *Loader* (1), where I held a solicitor liable for the costs of the suit which were caused by deeds he had prepared, and which never ought to have been prepared, and the authorities I relied upon in that case, I think I cannot do less than hold that *Elmslie, Forsyth, & Sedgwick* are liable for the costs of this suit.

With regard to the Defendant *Ogle,* he was interested in the concession, and sold his interest, on the 1st of March, 1871, to *Hartmont,* who was to give him 33⅓ per cent., that is, one-third of the profit made by the operation. He sold his interest to *Hartmont,* on the 1st of March, 1871, for £500, the same day that *Hartmont* bought *Lawson's* interest. *Ogle,* I am satisfied, knew of the worthlessness of the concession, or he would not have sold his one-third, to which he was entitled, for £500. He nevertheless negotiated and took an active part on behalf of *Hartmont* in promoting the company, which he must have known could only end in disaster, except so far as it afforded the means of trafficking in shares. Upon the whole, I do not find enough to charge him with the purchase-money; but I think there is enough to make him also liable for the costs of the suit.

With regard to the Defendants Captain *Cockburn,* Colonel *Grant,* and General *Green,* I acquit them of all fraudulent intentions. I remain of the opinion which I expressed at an early stage of the argument, that they were imposed upon by *Hartmont* and his associates, and that they did not intend anything wrong; but they committed grave errors, and for those errors I must hold them also liable for the costs of the suit; but beyond that I cannot give any relief against them.

There are various charges made against these gentlemen. First of all, there was, I must say, negligence, a blindness and readiness to be imposed upon, on the part of those gentlemen that is utterly incredible. How they could have believed all they did; how they

(1) Law Rep. 16 Eq. 49.

could have so readily fallen into the trick of these more cunning men than themselves, is, I say, perfectly astounding. Take Colonel *Grant*. First of all, he knew of the payment of £15,000 to *Engelback & Keir*, which he never disclosed, as he ought to have done, to the public at large. He was allowed to receive paid-up shares, which is a thing most unbecoming in any director of a company. He received ninety shares and £100 in money, and he got an allotment of 200 shares, and also 235 shares; and he sold no less than 800 shares. To my mind, it is a circumstance of grave importance on the part of a director to be trafficking in shares of the company of which he is a director, because, directly he begins trafficking in shares the real interest of the shareholders is lost sight of; he is no longer directing his attention to make the thing a paying concern, which alone can justify the formation of the company; his mind is devoted to other objects, which are altogether improper; and, above all, Colonel *Grant* signed the certificate to the *Stock Exchange* containing those false statements as to the issue of shares unconditionally, which it has been conclusively proved would, if known, have prevented the settling day being granted. I am aware that Colonel *Grant* says he signed it in *Scotland*. He chose to become chairman of a company, in which grave interests were involved, in which a most important step had been taken, upon which the whole fate of the company might depend. He thought fit to absent himself, to go to *Scotland*, at the time when such a step was to be taken. I think he ought to have been more cautious before signing the paper, and to have made himself acquainted with the real transaction; and if he had done so there would have been no settling day obtained, and none of these nefarious transactions and trafficking in shares by which the public have been defrauded would ever have taken place. Therefore, although I feel unable to make a decree against Colonel *Grant*, he must certainly be liable for the costs of the suit.

With regard to General *Green*, I feel the statement made to me by his counsel, Mr. *Romer*. He was a man somewhat advanced in life, utterly inexperienced in this kind of business, and seems to have fallen a ready victim to *Hartmont* and *Ogle*. I cannot express my astonishment to find from his own statement that, not having been acquainted with *Ogle* more than a month, he became his tool

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to apply for shares in the company; he got them alloted to him, and did as *Ogle* bade him with regard to these shares. Therefore, upon these and various other grounds, I think General *Green* must also be answerable for the costs of the suit.

The same observation, in a less degree, applies to Captain *Cockburn*. He was guilty of the same want of caution, and is liable for the same course of action, and I must hold him also liable for the costs of the suit.

With regard to Mr. *Lonsdale*, he was the secretary of the company, and though much was made of his having bought the secretaryship from a former secretary, Mr. *Parry*, for £300, I cannot give any relief against him on that account. He did wrong in joining Colonel *Grant* in signing the untrue certificate to the *Stock Exchange*. There is a recent decision of the Master of the Rolls, in the case of Lord *Londonderry* (*Eaglesfield* v. *Marquis of Londonderry* (1)), where a false statement was made by the secretary and chairman of a company, not knowing it to be false, but which was quite false, and he held them all liable to make good that statement. They all signed a certificate that a particular person held shares in the company, and it turned out that he did not; some one advanced money upon them, and the Master of the Rolls held that they were all liable, the secretary included. Therefore, although Mr. *Lonsdale* did wrong in joining Colonel *Grant* in signing the untrue certificate to the *Stock Exchange*, considering he was at that time the secretary, although he afterwards became a director, he was at that time a servant of the company only. I think the bill may be dismissed against him without costs. I certainly cannot give him any costs.

It has been arranged, I understand, that the Defendant *Ramsden* is to be dismissed upon terms which the parties have arranged, and therefore it is not necessary for me to give an opinion with regard to Mr. *Ramsden's* part in the transaction. The purchase for £65,000 included *Forbes'* patent, which is stated not to have been of any value; but it must, of course, be returned upon the re-payment of the purchase-money. The concession has been lost from a defect in the title inherent in the grant itself, and therefore it cannot be returned; there can be no restitution as to that.

(1) 4 Ch. D. 693.

This case has afforded me a very great deal of difficulty to ascertain what the transaction as to the purchase-money was. None of the documents state the transaction truly. I cannot find out how much was paid in shares and how much in money; that, somehow or other, must be ascertained. If it was paid in shares, I suppose that to follow the rule adopted by the Court of Appeal in *In re Morvah Mining Company, McKay's Case* (1), would be the right course, though they took the shares for the full value. A separate price was paid for *Forbes & Price's* patent, but as no relief is asked as to that, I do not interfere with it. With regard to the proceedings in *Scotland* against the assignees of *Peter Lawson & Son*, I regret that so much money was expended in a contest which was of little value, as the Courts in that country could only decide as to the liability of *Lawson's* estate, and the dividend likely to be obtained from that is insignificant. I am surprised, and regret that the parties did not concur in setting aside the dividend applicable to the claim to abide the decision of this Court, which had all the parties before it in this suit at the time, and which was the proper tribunal for the decision of the question between the parties in this case.

There are minor matters of relief included in the prayer of the bill, as, for instance, an account against *Ogle* for his commission, and the return of the commission which *Engelbach & Keir* received; but considering the nature of the decree, I shall not enter into these smaller points, and the decree will stand as I have stated it.

The minutes will require some care in framing, and, if necessary, they can be spoken to.

I have now explained what my decree is against all parties on the record.

March 22. The case was spoken to on the minutes when the terms of the decree were finally settled.

From this decision the Defendants *Hartmont, Engelbach,* and *Molleson* appealed. C. A.

The case came on before the Court of Appeal on the 16th of January, 1877.

(1) 2 Ch. D. 1.

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Glasse, Q.C., and *Terrell*, for the Defendant *Hartmont*:—

The evidence shews that there is no ground for the charges of fraud against *Hartmont*, or those who acted with him, in selling the concession to the company. That question is concluded by the judgment of the House of Lords in the Scotch appeal. The company has no *locus standi* in this suit against the directors; the bargain was made by the company itself, for the company consisted at the time of the bargain of no other persons than the directors. All subsequent shareholders came in with knowledge of the bargain. The case of each shareholder stands on its own ground, and if any one can make out a case of deception, he can get the money which he has paid returned, but he cannot set aside the bargain. The Plaintiffs cannot set aside the sale unless they can shew that there can be a *restitutio in integrum*, which is impossible in this case, owing to the default of the company themselves in their subsequent working of the concession.

Higgins, Q.C., and *Davey*, Q.C. (*R. Melville* with them), for the Plaintiffs, were called on by the Court to argue the question respecting the right to *restitutio in integrum*, and the effect of the decision in the Scotch Court:—

The rule of *restitutio in integrum* is sometimes stated too broadly. The real rule is only that the purchaser has no remedy if entire restitution is prevented by his act or default: *Western Bank of Scotland* v. *Addie* (1); *Pothiér, Traité de Vente* (2); *Head* v. *Tattersall* (3); *Blake* v. *Mowatt* (4). The same view is taken in *America*: *Masson* v. *Bovet* (5); *Kent*, Comm. (6).

[BRAMWELL, J.A., referred to *Clarke* v. *Dickson* (7).]

Those observations refer to a change caused by the act of the party complaining.

[BRAMWELL, J.A., referred to *Street* v. *Blay* (8).]

Storey on Contracts (9). The other side rely on the *dictum* of

(1) Law Rep. 1 H. L., Sc. 145.
(2) Page 220.
(3) Law Rep. 7 Ex. 7.
(4) 21 Beav. 603, 613.
(5) 1 Den. 69.
(6) 12th Ed. vol. ii. p. 482, n.
(7) E. B. & E. 148, 153.
(8) 2 B. & Ad. 456, 460.
(9) Sect. 1337.

Lord *Cranworth* in *Western Bank of Scotland* v. *Addie* (1), but the substantial point in that case was how far representations by directors are imputable to the company. *Perley* v. *Balch* (2) lays down the same doctrine as the other American cases. If the property is in part such that no return is possible, a return of the whole is not required; if it were, a promoter might always contrive to make a contract incapable of being upset by putting in something the restitution of which was impossible. As to one point on which the Court seemed against us, we say it is impossible now to dismiss the bill without prejudice to an action: *Judicature Act*, 1873, s. 24. Moreover, relief in equity is the proper relief: *Lindley* on Partnership (3). The Defendants in this case had no title. The property became liable to forfeiture in 1870. It is said that none but future shareholders could be defrauded, for that all the parties concerned knew the facts; but that is no answer, for the company represents the future shareholders, and perfect good faith is required on the part of promoters: *Lindley* on Partnership (4).

[JAMES, L.J.:—Is not this *res judicata?*]

No. *Moss* v. *Anglo-Egyptian Navigation Company* (5).

The Scotch case went merely on the law of vendor and purchaser: the position of *Lawson* as director was not taken into account. The Scotch proceedings are not pleaded, and so are not conclusive. We had no right in *Scotland*, unless the conveyance was set aside, and the Scotch Court had no jurisdiction to do that. 19 & 20 Vict. c. 79, ss. 121, 126, 127, shews how a judgment may be conclusive to a limited extent only. A judgment is not conclusive as to matters which only come before the Court collaterally: *Barrs* v. *Jackson* (6); *Hunter* v. *Stewart* (7); *Tatham* v. *Wright* (8); *Davis* v. *Hedges* (9).

[JAMES, L.J.:—Suppose a suit by a purchaser to set aside a sale for fraudulent suppression of a fact. The vendor proves that the

(1) Law Rep. 1 H. L., Sc. 145, 164.
(2) 23 Pick. 283.
(3) 3rd Ed. vol. ii. p. 973.
(4) Vol. i. p. 595.
(5) Law Rep. 1 Ch. 108.
(6) 1 Y. & C. Ch. 585, 595.
(7) 4 D. F. & J. 168.
(8) 2 Russ. & My. 1.
(9) Law Rep. 6 Q. B. 687.

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fact was known to the purchaser's agent, and the bill is dismissed. The purchaser files a new bill, alleging that the vendor bribed the purchaser's agent to conceal the fact from the purchaser. Can the dismissal be successfully pleaded ?]

That is this case, and the answer is, certainly not; for the cases by the two bills are not the same. The agents are responsible as parties to the fraud: *Lindsay Petroleum Company* v. *Hurd* (1); *Cullen* v. *Thompson* (2); *Swift* v. *Winterbotham* (3); *Tyrrell* v. *Bank of London* (4).

Engelbach appeared in person:—

My partner and I were not promoters of the company; we had no fiduciary character; and we can be only made liable if we joined in a fraudulent scheme to defraud the company. All such charges of fraud against us are utterly groundless. We knew that, so far as the guano was concerned, the concession was worthless, but we believed that the phosphate of alumina was very valuable, and we had tested the patents in various ways at considerable cost, and hoped that they would produce a great profit. We, therefore, honestly acted as agents in the purchase and sale to the company. The sum of £15,000 was not given to us as a bribe, but as commission, and we did not receive that from the company, which was not then formed, but from the vendors, and we had a right to receive what we bargained for. In the investigation of the title we trusted to *Forsyth's* assurances, whom we believed to be acting in the interests of the intended company, and to the position of *Lawson & Son* as a well-known and respected firm. In that intermediate purchase we were not trustees for the company, but only bare trustees to gather together all the interests of the various vendors.

J. Pearson, Q.C., and *Locock Webb*, Q.C., for the Defendant *Molleson*:—

The first charge made against *Lawson* is misrepresentation as

(1) Law Rep. 5 P. C. 221.
(2) 4 Macq. 424.
(3) Law Rep. 8 Q. B. 244; S. C. on appeal nom. *Swift* v. *Jewsbury* (Law Rep. 9 Q. B. 301).
(4) 10 H. L. C. 26.

to the £39,000, but it is impossible to connect him with the representation; it was a statement by *Forsyth* founded on materials not derived from *Lawson*. The second charge is that *Lawson* knew that there had been no guano exported, and that the concession was liable to forfeiture, but suppressed the fact. But the forfeiture was not for not exporting guano, which made no difference to the Government, but for non-payment of royalties which were paid on the tonnage of the ships. The Scotch case is conclusive; the pleadings there were not closed till after *Hartmont's* answer had been put in here, and the company knew everything. There has been gross delay; the company were satisfied with their bargain, and never thought of setting it aside till the concern had failed through their own mismanagement. The company went on dealing with *Mendes*, and never said a word to us.

Higgins, Q.C., *Davey*, Q.C. (*R. Melville* with them), for the Plaintiffs, then proceeded with the argument on the whole case made against the Defendants:—

The grounds upon which we claim relief are, first, that the concession, when sold to the company in April, 1871, through the agency of *Engelbach & Keir*, was worthless. Secondly, that all the parties to the transaction were engaged in a fraudulent scheme to bring out a company and sell the concession to it as a valuable property, knowing it was worthless. Thirdly, that there was a distinct misrepresentation and failure of duty in the manner of carrying out the purchase, the name of *Hartmont* being concealed, and the proper investigation of the title being avoided. Fourthly, that the purchase-money was increased by the payment of £15,000 to *Engelbach & Keir*. Fifthly, that the statement as to £39,000 having been spent on the island was untrue. Sixthly, that the Defendants stood in the position of trustees to the company which they projected, and are bound to make no profit by the transaction, but must return all the money which they received, including the £15,000 received by *Engelbach & Keir*. We rely on *Panama and South Pacific Telegraph Company* v. *India Rubber, &c., Company* (1); *Lindsay Petroleum Company*

(1) Law Rep. 10 Ch. 515.

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v. *Hurd* (1); *Clarke* v. *Dickson* (2); *Hichens* v. *Congreve* (3); *Fawcett* v. *Whitehouse* (4).

Glasse, in reply, referred to *Attorney-General* v. *Wilson* (5).

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April 13. JAMES, L.J., delivered the judgment of the Court (*James*, L.J., *Bramwell* and *Amphlett*, JJ.A.). After stating the events which happened before the formation of the company, and referring to the prospectus and memorandum of association, and the deeds which were executed for vesting the concession in the company, and very particularly as to what had taken place with respect to the vendor's title, his Lordship continued:—

After this narrative of the facts, it is obvious that, unless some other answer can be given from subsequent adoption, acquiescence, or laches, or some other admissible ground, the company was entitled to be relieved from a transaction by which they were saddled with such a property for such a sum. The whole transaction was engendered in fraud, conceived in fraud, and brought forth in fraud. *Hartmont*, concealed behind the mask of the *Lawsons*, was the real vendor, and by the puppets whom he moved was the real promoter of the company. Messrs. *Engelbach & Keir*, who professed to be acting for the company, and entered into the contract avowedly as agents and trustees for the company, received a commission from the vendors—in other words, a bribe of £15,000. By the memorandum and articles of association the company was actually fixed with the purchase, unless there was some one honest enough and intelligent enough to detect the fraud; and it was part of the scheme that the solicitors of the vendors, who were the artisans of the whole matter, should be the solicitors of the company, so that the latter should be denuded of all legal advice. The secretary, *Lonsdale*, had received his appointment from the promoters —that is to say, from *Hartmont*, *Engelbach*, and *Keir*. The subscribers to the memorandum, who were by law the original directors, included *Grant*, *Green*, *Keir*, *Lonsdale*, and *Ramsden*; and

(1) Law Rep. 5 P. C. 221.
(2) 6 C. B. (N.S.) 453.
(3) 4 Russ. 562.
(4) 1 Russ. & My. 132.
(5) Cr. & P. 1, 26.

Grant, *Green*, *Keir*, and *Lawson*, were four of the directors in the articles of association. What chance was there of the company being rescued from the toils in which it had been so craftily entangled? There remains to be considered the question whether the company have lost their right by the lapse of time between the purchase and the filing of the bill. The company's explanation of it is this: *Hartmont* emerged from his obscurity, and was, in August, 1872, elected (as with his preponderating influence in the company it was easy for him to be) director, and he afterwards became chairman. By certain dealings and means, although the company had never really earned a shilling from working the island or the patents, the shares rose to fabulous prices. Companies were started abroad to work the patents and use the material, which came to nothing, and deposit moneys were paid on contracts for the use of the patents. The companies soon collapsed and proved abortive; but the deposit moneys were used as earnings, and dividends declared and paid. There was, moreover, one most extraordinary transaction. A formal contract was entered into on the 6th of March, 1872, between the company and a M. *Emile Oppert* for the sale of the French patent, which had been taken out by the company, for no less a sum than £250,000, payable by instalments extending over twelve months. Two days afterwards *Oppert* writes to say that he is prepared to pay £150,000 in cash down if the company will accept it, instead of the larger sum. A meeting of shareholders is convened to consider the proposal. The chairman proposed the acceptance of the money down, which was carried with very few dissentients.

Mr. *Hartmont* made a speech, which was to the following effect: He thanked the chairman for the terms in which that gentleman had alluded to him, and said the directors had not desired to influence the shareholders as to which of the two alternative propositions should be accepted. It was his own firm conviction that the contract, if entered into, would be carried out to the full extent. He did not conceal from himself the fact that the political circumstances of *France* were such that it might possibly be desirable for the shareholders to accept £150,000 instead of the quarter of a million with the payment extending over twelve months, but the directors would leave the shareholders to decide

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which they would accept. On a poll being demanded, the resolution was negatived by the votes of Mr. *Hartmont* and his nominees; £4000 were paid, and afterwards, in September, 1872, £10,000 more in bills were paid in respect of this contract. It now turns out that, with the exception of the payment of the £14,000, the whole of this was a mere sham; that *Oppert* was a mere tool of *Hartmont;* that *Oppert* made his offer, entered into the contract, and wrote the subsequent letter under *Hartmont's* dictation, and that the £14,000 was *Hartmont's* money which he thought it worth his while for some ulterior purpose to pay. The company was kept by these means in a fool's paradise. In August, 1872, the agent of the *San Domingo* Government wrote to announce an intention to forfeit the concession. This letter was addressed to and received, but suppressed, by *Hartmont.* Another letter however, written in October, 1872, reached the directors, who were naturally incensed at the suppression of the first letter, and *Hartmont* was obliged to resign. A committee of investigation was appointed, who summoned *Hartmont* before them on the 20th of January, 1873. In April, 1873, the bill was filed, and it was only through the answers in the suit and the discovery of documents obtained in it that the real history of the wonderful romance of the getting up of the company and the sale of the concession was discovered. Under these circumstances it is impossible to hold that there has been any acquiescence or any laches on the part of the company.

It is suggested that there is a difficulty arising from the incapacity of the company to restore the concession, which has become voidable, and has been avoided, and, as is argued, through the neglect of the company itself in not working the stipulated quantity of 10,000 tons since they took possession. But, in truth, it was void or voidable when the sale to the company was made.

The letter of the 4th of October, 1872, from the agent of the *San Domingo* Government contains the following passage:—

"If I refer to the prospectus of the company on one side, and on the other side to the positions of the exportations of guano, guanitos, and phosphates of lime from *Alto Vela,* I am led to the following conclusions, namely, that on the 28th of April, 1871, the

date of the transfer made to you of the working of *Alto Vela*, the right to such working had already ceased to exist, owing to the fact that in the course of the year 1870 a quantity of 1981 tons of guano only had been exported from the island in question. From that time the parties working *Alto Vela* in the year 1870 had already incurred the forfeiture of their right thereto, and could not, therefore, take upon themselves to sell to you on the 28th of April, 1871, a thing which they possessed then no longer the slightest right to." In the suppressed letter of the 28th of August, 1872, the agent writes: "In consequence thereof the government has the right from this moment to declare the said grantees as having forfeited their concession. This right the government reserves to itself, even in the event of the minimum quantity stipulated for being reached by the grantees in future." According to the law of *England*, it may be that allowing the working to go on in 1871 and 1872 was a waiver of the forfeiture by deficient workings in 1870 and 1871, if such deficient workings were known to the grantors; but, in this case, the defaulting grantees were the persons to receive the income from the working, and it is not probable that the government, or any government, would recede from their position "that the parties working had already incurred a forfeiture, and could not, therefore, take upon themselves to sell to you, on the 28th of April, a thing which they possessed no longer the slightest right to." And it seems abundantly clear that, there being no guano, no phosphate of lime, nothing but phosphate of alumina on the island, the concession of the right to work it at $1 60c. a ton would be absolutely valueless. Under these circumstances, it is not an answer to the Plaintiffs' case to say that they had not worked the 10,000 tons during the year 1871–2, and thereby created an additional cause of forfeiture of that which had already been forfeited, and was valueless. Possibly the *San Domingo* Government would have been glad to have renewed the concession if all the royalties due had been paid; but it was for *Hartmont* and the *Lawsons* to do this when *Hartmont* received the notice of forfeiture.

The next question to be considered is, whether Messrs. *Lawson & Son* are liable with *Hartmont* and *Begbie*. It is impossible that they can be allowed to escape. They really were accom-

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plices in the whole transaction. It was they who undertook to give *Engelbach & Keir* the bribe of £15,000. They, for a pecuniary consideration, undertook to execute whatever deeds *Hartmont* might require. They had full notice, through their solicitors, of all that was done in and about the contract, the title, the prospectus, and the deeds. They executed the sham contract with *Engelbach & Keir;* they accepted the sham conveyance from *Hartmont* to themselves; and they executed the deed of assignment to the company; and they, with full knowledge and notice of these facts, received and distributed the money and shares—in short, the plunder, of which they retained £5000 in shares themselves; and one of the partners had himself a seat on the board of directors at that time. It was strongly urged on us by the counsel for their trustee, that they had by the agreement with *Hartmont* become mere trustees for him. This is not so, for they were to receive the £5000 in shares out of the transaction, and it is, to say the least, doubtful whether, if the transaction had fallen through, they could have retained the money received from *Hartmont.* But even if they were mere trustees, trustees lending themselves to a fraud by their *cestuis que trust,* and receiving the money from the defrauded party, cannot escape from the liability which attaches alike to them and to their *cestuis que trust.* And that liability is a joint and several liability of all the accomplices. We feel ourselves pressed by the decision of the House of Lords in the appeal from *Scotland,* but all the learned Lords who advised the House on that occasion most carefully confined their judgments to the case presented on the Scotch pleadings. The case so presented is substantially different from the case which by means of the discovery and evidence obtained in the English suit the Plaintiff company has been enabled to allege and prove against the *Lawsons.* Nothing in our present judgment conflicts with anything decided or said in that House, except, perhaps, as to the one statement relating to the expenditure of the £39,000, as to which, on the fullest consideration and reconsideration, we retain our opinion that it was calculated and intended to deceive, and was substantially, therefore, a false representation. And, in fact, the Plaintiffs were enabled to place that part of the case, like the other parts of it, in a very different

way from that which they were able to do in the Scotch proceedings.

With regard to *Engelbach & Keir*, the Vice-Chancellor could certainly do no less than he has done in making them refund the £15,000 which they received as what is called "commission." Commission received by an agent or trustee of a purchaser from a vendor without the knowledge of his principal is, in this Court, a bribe—it is a profit which the principal has a right to extract from the agent whenever it comes to his knowledge. Having regard to the whole case, they may, perhaps, think themselves well off that they were not made jointly and severally liable with *Hartmont* and the *Lawsons* for the whole sum. On the whole, the decree of the Vice-Chancellor must be affirmed, and the appeals of the several Appellants dismissed with costs.

Solicitor for Plaintiffs: *J. Holmes.*

Solicitors for different Defendants: *Elmslie, Forsyth, & Sedgwick; Ramsden; Cope, Rose, & Pearson; H. Kimber & Co.*

M. R.

1876

Nov. 28, 29.

POOLEY *v.* DRIVER.

[1876 P. 2.]

Partnership—Partnership (Bovill's) Act, 1865 (28 & 29 *Vict. c.* 86)—*Loan Deed—Unsigned Contract—"Contract in Writing"—Trial of Action—Deciding Question of Law before one of Fact—Rules of Court*, 1875, *Order* XXXIV., *r.* 1—*Action on Bill of Exchange in Chancery Division—Costs—"Higher Scale"—Additional Rules of Court* (12*th August*, 1875), *Order* VI., *rr.* 2, 3.

The 1st section of *Bovill's Act* (28 & 29 Vict. c. 86) does not apply to any contract unless the advance of money under it would, independently of that Act, have created the relation of debtor and creditor as distinguished from the relation of partners.

Under a partnership deed, dated in October, 1868, *B.* and *H.* agreed to enter into a trade partnership under the firm of "*B.* & *Co.*" for fourteen years from the 1st of July, 1868; the capital to consist of £30,000, of which part was to be brought in by *B.* and *H.*, and £10,000 was to be raised "by way of loan under the *Partnership* (*Bovill's*) *Act*, 1865 (28 & 29 Vict. c. 86), in sums of £500 each, from persons willing to advance the same for the purposes of the partnership;" the capital to be considered as divided into sixty equal parts of £500 each, of which forty were to belong to *B.* and *H.*, and the remaining twenty were to be appropriated to "the persons so advancing by way of loan," in proportion to the advances; the net profits of the partnership to be similarly divided into sixty equal parts, of which twenty were "to be divided among the persons so advancing by way of loan," in proportion to the advances; provided, that if the whole of the £10,000 should not be raised by way of loan (as it was not), and until the sum should be so raised, the net profits should be divided into as many shares as there should be sums of £500 in the capital of the partnership, and be paid yearly, on the 1st of October, to the said persons on account of their respective shares of profits; on the expiration or sooner determination of the partnership a general account and valuation to be taken, and the partners to pay "to the persons advancing money by way of loan for the capital of the partnership," as aforesaid, the moneys advanced by them respectively, less any sums overpaid to them on account of profits, and divide the profits in the proportions above specified. The deed also contained a stipulation that the parties thereto should, during the continuance of the partnership, conduct the business to the best of their ability; and other provisions usually inserted in partnership deeds.

Shortly after the date of this deed, the Defendant, *D.*, advanced to *B.* and *H.* the sum of £500 upon certain terms stated in the draft of an intended deed, which, however, was never executed. This draft deed was expressed to be made between *B.* and *H.*, "co-partners," of the one part, and *D.* of the other part; it recited the partnership deed, and that *D.* had "agreed to advance by way of loan to *B.* and *H.*, under the provisions of the said Act, the

sum of £2500 to enable *B.* and *H.* to carry on the said business for the term, and subject to the conditions thereinafter mentioned:" it then witnessed that "in consideration of the sum of £2500 advanced" by *D.* to *B.* and *H.*, the latter covenanted "that they would on the 1st of July, 1882, or on the sooner determination of the partnership, pay *D.* the sum of £2500:" that they would in all things conform to the aforesaid deed of partnership, which should at all times be open to *D.*'s inspection: that they would every year, "during the continuance of the loan," make out proper accounts and permit *D.* to take copies: and would on the 1st of October in every year, "during the continuance of the loan," pay to *D.*, on account of profits, a sum equivalent to five-sixtieth parts of the net profits in the year preceding the 1st of July then last; provided, that if the full sum of £10,000 should not be advanced as contemplated by the said deed of partnership, *B.* and *H.* would yearly, on the 1st of October, pay to *D.*, in lieu of the said five-sixtieth parts of the net profits, such a proportion of the net profits as the £2500 bore to the whole capital employed in the business: that if *D.* should become bankrupt, *B.* and *H.* might pay *D.* the £2500, less any sum overpaid to him "on account of the business," together with the share of profits (if any) to which he should have become entitled, whereupon the present deed should be void: that on the expiration or sooner determination of the partnership, *B.* and *H.* should make out a final account and valuation of the partnership moneys and effects, and then pay thereout to *D.* the £2500 and five-sixtieths of the net profits, or, if the full £10,000 should not have been advanced, then, in lieu of such five-sixtieths, such a proportion of the net profits as the £2500 bore to the capital employed in the business; provided that if, at the end of the fourteen years or sooner determination of the partnership, it should appear, upon taking the final account, that *D.*'s share in the net profits during the continuance of the partnership should not have amounted to the total of the annual sums received by him on account of such profits, then *D.* should refund to the partnership the difference between the amount of the said annual sums and the real amount of his share in the net profits, but should not, in any event, be called on to refund more than £2500. The deed then concluded with the usual arbitration clause.

The two other Defendants made advances to *B.* and *H.* under deeds duly executed in the same form in all respects as *D.*'s draft deed.

The firm of "*B. & Co.*" having become bankrupt, *P.*, the holder of various bills of exchange drawn or accepted by the firm, brought an action against *D.* and the other Defendants, claiming a declaration that the several Defendants were partners in the firm, and as such liable on the bills:—

Held, that, as between *B.* and *H.* on the one hand, and the several Defendants on the other, the transaction was not one of loan within the Act, the true relation of the parties being that of active and dormant partners, and not merely of debtor and creditor; and that the several Defendants were liable, as partners, for the whole of the partnership debts.

An unsigned contract for an advance by way of loan to a trader is not "a contract in writing with a person" within the 1st section of the Act, though it is admissible in evidence as shewing the terms upon which the advance was made.

In the absence of something in the contract to shew a contrary intention,

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the right to share profits, as profits, constitutes, according to English law, a partnership.

The principles of partnership considered and explained.

Cox v. *Hickman* (1), and *Mollwo, March, & Co.* v. *Court of Wards* (2), considered.

Order XXXIV., rule 4 (Rules of Court, 1875)—under which, in any action involving questions both of law and of fact, the Court may direct the question of law to be raised for its opinion before trying the question of fact—has reference only to a case where the action has not yet come on for trial; but, by analogy to that rule, the Court will, at the trial of an action involving questions both of law and of fact, decide the question of law first, if it shall appear that the decision of such question may render it unnecessary to try the question of fact.

In an action on a bill of exchange properly brought in the Chancery Division, costs may be allowed on the higher scale: Additional Rules of Court (12th August, 1875), Order VI., rr. 2, 3.

Statement.

IN October, 1868, *Charles Borrett* and *Edward Hagen* entered into partnership as grease, pitch, and manure manufacturers. The partnership deed was dated the 10th of October, 1868, and was made between the said *Charles Borrett* of the one part, and the said *Edward Hagen* of the other part, its material parts being as follows:—

"Whereas the said *Charles Borrett* has for some time past carried on the trade or business of a grease, pitch, and manure manufacturer at *Bow* and *Rainham*, both in the county of *Essex:* and whereas the said *Edward Hagen* has agreed to enter into partnership with the said *Charles Borrett* in the said trade or business on the terms hereinafter mentioned: Now this indenture witnesseth, that each of them the said *C. Borrett* and *E. Hagen*, so far as the stipulations and provisions hereinafter expressed and contained are to be performed or observed by him, his executors or administrators, doth hereby, for himself, his heirs, executors, and administrators, covenant with the other, his executors and administrators, that they the said *C. Borrett* and *E. Hagen* will become and remain partners for the purposes and period, and subject to the stipulations and provisions hereinafter expressed and contained (that is to say):

"1. The business of the partnership shall be the trade and business of a grease, pitch, and manure manufacturer.

"2. The partnership shall commence from the 1st day of July,

(1) 8 H. L. C. 268. 7 Jur. N. S. 105 (2) Law Rep. 4 P. C. 419.

1868, and shall continue for the term of fourteen years thenceforth next ensuing, and shall be carried on at and upon the several premises, situate at *Bow* and *Rainham* aforesaid, where the same business is now carried on as aforesaid, under the style or firm of *Charles Borrett & Company*, or such other place or places, and under such other style or firm as the said parties may deem advisable.

"3. The capital of the partnership shall consist of £30,000, made up in manner following, that is to say: the goodwill and beneficial contracts of the said trade or business shall be taken to be of the value of £15,000; the said *C. Borrett* shall bring in the further sum of £1000, and the said *E. Hagen* the further sum of £4000; and the remaining £10,000 shall be raised by way of loan under the provisions of an Act passed in the twenth-eighth and twenty-ninth years of the reign of her present Majesty, intituled '*An Act to amend the Law of Partnership*,' in sums of £500 each from persons willing to advance the same for the purposes of the said partnership; and the said capital shall be considered as divided into sixty equal parts of £500 each; and the said *C. Borrett* shall be considered as the owner of seventeen of such parts, and the said *E. Hagen* as the owner of twenty-three of such parts, making together forty equal parts or shares of £500 each held by them in the said business; and the remaining twenty equal parts or shares shall be considered as appropriated to or for the benefit of the person or persons so advancing money by way of loan as aforesaid on the proportion on which the same shall be advanced by them respectively.

"4. The capital of the said business shall be used and employed in the regular course of trade for the benefit of the partnership, and shall not be drawn out during the continuance of such partnership."

5. Bankers of the partnership.

"6. The said parties hereto shall during the continuance of this present partnership conduct the said business to the best of their skill, judgment, and ability."

7. Proper books of account and other books to be kept, in the usual way, with power for the partners to inspect and take copies.

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8. Neither partner to sell or lend any of the partnership effects, nor borrow on account of the partnership, without the consent of the other.

9. Neither partner to do anything whereby the partnership assets might be taken in execution; and each partner to indemnify the other against his own debts and engagements.

10. Neither partner to hire or discharge any clerk or servant, or sell his own private property to the partnership without the consent of the other.

11. All outgoings in respect of the partnership to be borne by the capital and profits, or, in case of deficiency, by the partners equally.

12. *C. Borrett* to be at liberty to draw out for his own use £25 per month.

13. A general account and valuation to be taken on the 1st of July in every year, in the usual manner, and entered in two books, one to be retained by each of the partners.

"14. The net profits arising from the business of the said partnership shall be divided into sixty equal parts or shares, and the said *C. Borrett* shall be entitled to seventeen of such parts or shares, and the said *E. Hagen* to twenty-three of such parts or shares; and the remaining twenty of such parts or shares shall be divided amongst the persons advancing the sum of £10,000 so to be raised by way of loan as aforesaid in proportion to the amounts advanced by them respectively: Provided always, that if the whole of the said sum of £10,000 shall not be raised by way of loan, and until the sum shall be so raised, the net profits arising from the business of the said partnership shall be divided into as many parts or shares as there shall be sums of £500 in the capital of the said partnership, such capital being estimated in manner hereinbefore provided, and be paid on the 1st day of October in every year to them respectively, on account of their respective shares in the clear gains and profits of the said partnership.

"15. Within six calendar months after the expiration or sooner determination of the partnership, otherwise than by the death of one of the partners, a final statement of accounts in writing shall be forthwith made by and between the said parties hereto, of and

concerning all the goodwill, stock in trade, plant, moneys, credits and effects then due or belonging to the said partnership, and also of all debts and sums of money due and owing from and of all liabilities of the same, and a just valuation shall be made of all the particulars included in such account which shall require and are capable of valuation, and, immediately after such last mentioned account shall have been so taken and settled, the partners shall forthwith pay to the persons advancing money by way of loan for the capital of the partnership, as hereinbefore provided, the moneys advanced by them respectively, less any sums overpaid to them on account of the profits of the said partnership, and shall make due provision for the payment of all other moneys and debts then due by the partnership, and for meeting all the liabilities thereof, and shall divide all the profits arising and which shall have arisen from the business of the said partnership in the proportions specified in the 14th clause of these presents, and shall then appropriate the sum of £1000 for the benefit of the said *C. Borrett*, in satisfaction of two of his shares in the partnership assets, and the sum of £4000 for the benefit of the said *E. Hagen* in satisfaction of eight of his shares therein, such two last mentioned sums to be paid *pro ratâ* and *pari passu;* and, subject thereto, the goodwill and other assets, if any, then belonging to the partnership, shall be divided between the partners in equal shares . . ."

16. In case of the bankruptcy of either partner, the other partner to be at liberty to dissolve the partnership, and the partnership assets to be the absolute property of such other partner upon his paying or securing the value of the bankrupt partner's share to his assignees.

17. Provision for the widow and children of a deceased partner.

18 and 19. Provisions for payment of a deceased partner's share to his representatives.

20. Provision for winding up the partnership in case of the death of both partners before the expiration of the fourteen years.

21. Usual arbitration clause.

At or about the date of this deed, the Defendants, *Rolles Driver* and *Samuel Neale Driver*, advanced to Messrs. *Borrett* and *Hagen* the sum of £2500, upon the terms stated in another deed which

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was prepared in draft, but was never executed. This draft-deed was dated the — day of October, 1868, and was expressed to be made between Messrs. *Borrett* and *Hagen*, "co-partners," of the one part, and the said *Rolles Driver* and *Samuel Neale Driver*, of the other part. After reciting the partnership deed of the 10th of October, 1868, and, in particular, clauses 3 and 14 of that deed, it proceeded as follows:—

"And whereas the said *Rolles Driver* and *Samuel Neale Driver* have agreed to advance by way of loan to the said *C. Borrett* and *E. Hagen*, under the provisions of an Act of Parliament passed in the 28th and 29th years of Her present Majesty, c. 86, entitled '*An Act to amend the Law of Partnership*,' the sum of £2500, to enable them the said *C. Borrett* and *E. Hagen* to carry on the said trade or business for the term and under and subject to the stipulations and conditions hereinafter mentioned, expressed and declared concerning the same: Now this indenture witnesseth, that in consideration of the sum of £2500, at or immediately before the execution of these presents advanced and paid by the said *R. Driver* and *S. N. Driver* to the said *C. Borrett* and *E. Hagen* (the receipt, &c.), they the said *C. Borrett* and *E. Hagen*, do hereby, for themselves, their heirs, executors, or administrators, and, as separate covenants, each of them doth hereby, for himself, his heirs, executors, or administrators, covenant with the said *R. Driver* and *S. N. Driver*, their executors and administrators, in manner following, that is to say:

"1. That they the said *C. Borrett* and *E. Hagen*, or one of them, their or one of their heirs, executors, or administrators, will, within six calendar months after the 1st day of July, 1882, or within six calendar months after the sooner determination of the said partnership, pay unto the said *R. Driver* and *S. N. Driver*, their executors, administrators, or assigns, the sum of £2500 sterling.

"2. That the said *C. Borrett* and *E. Hagen*, their respective executors and administrators, shall in all things conform to, fulfil, and observe the covenants, clauses, and agreements contained in the said recited deed of partnership of the 10th day of October, 1868, and such deed of partnership shall at all times be open to the inspection of the said *R. Driver* and *S. N. Driver*, their

executors or administrators, at the office where the said business shall be carried on.

"3. That the said *C. Borrett* and *E. Hagen*, or one of them, or one of their executors or administrators, will, within three calendar months after the 1st day of July in every year during the continuance of the said loan, make out a proper account in writing of all the stock, credits, and other things belonging, due, or owing to the said partnership, and of all debts and liabilities due or owing from the said partnership, and a just valuation of all particulars capable of valuation included in such account, and will permit the said *R. Driver* and *S. N. Driver*, their heirs, executors, administrators, or assigns, or his or their agent at any time within the space of three calendar months next after the 1st day of July in every year, to take copies of the books of account and other books and writings relating to and connected with the said partnership, including the two books to be subscribed by the said partners referred to in clause 13 of the said deed of partnership, and shall and will, on the 1st day of October in every year during the continuance of the said loan, pay to the said *R. Driver* and *S. N. Driver*, or their executors, administrators, or assigns, on account of the profits of the said business, a sum equivalent to five equal sixtieth parts of the apparent clear gains and profits made by the said partnership in the year preceding the 1st day of July then last past . . . . Provided always, that if the full sum of £10,000 shall not be advanced and lent to the said *C. Borrett* and *E. Hagen* as contemplated by the said recited indenture of partnership, the said *C. Borrett* and *E. Hagen*, or one of them, their or one of their executors or administrators, will, on the 1st day of October in every year during the continuance of the said loan, pay the said *R. Driver* and *S. N. Driver*, their executors, administrators, or assigns, in lieu of the said five equal sixtieth parts of the said clear gains and profits as last aforesaid, such a proportion of the said clear gains and profits as last aforesaid as the said sum of £2500 bears to the whole capital for the time being employed in the said business, such capital being estimated in manner provided by the said indenture of partnership.

"4. That if either the said *R. Driver* or *S. N. Driver* shall become bankrupt, or shall compound with his creditors, or in

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case any difference or dispute shall at any time during the said term of fourteen years arise between the said parties hereto, or their representatives, and which differences or disputes shall be considered by arbitration, as hereinafter mentioned, to justify the determination of the arrangement hereby agreed upon, it shall be lawful for the said *C. Borrett* and *E. Hagen*, or the survivor of them, or their or his executors and administrators, at any time hereafter to pay the said sum of £2500, less any sum they shall have been overpaid on account of the said business, to the said *R. Driver* and *S. N. Driver*, their executors, administrators, or assigns, together with the share of the said profits (if any) to which the said *R. Driver* and *S. N. Driver*, their executors, administrators, or assigns, shall then have become entitled, and thereupon this agreement and everything herein contained shall be void, except in respect of any further breaches of the provisions herein contained.

"5. Within six calendar months after the expiration or sooner determination of the partnership a final settlement of the accounts of the partnership shall be forthwith made in writing by the said *C. Borrett* and *E. Hagen*, their executors or administrators, concerning all the stock-in-trade, plant, moneys, credits and effects then due or belonging to the said partnership estate, and also of all debts and sums of money (if any) due or owing from, and of all liabilities of the same, and a just valuation shall be made of all the particulars included in such account which shall require and are capable of valuation, and immediately after such last-mentioned account shall have been so taken and settled, the said *C. Borrett* and *E. Hagen* shall forthwith pay thereout to the said *R. Driver* and *S. N. Driver*, their executors, administrators, or assigns, the sum of £2500, and shall make due provision for the payment of all other moneys and debts then due by the partnership, and for meeting all liabilities thereof, and shall pay to the said *R. Driver* and *S. N. Driver*, their executors, administrators, or assigns, the five equal sixtieth parts or shares of all the net profits of the said business, or if the full sum of £10,000 shall not have been advanced and lent to the said *C. Borrett* and *E. Hagen*, and employed by them in the said business, then, in lieu of the said five equal sixtieth parts of the said net profits, such a

proportion of the said net profits as the said sum of £2500 bears to the average amount of capital which has, during the whole partnership, been employed in the said business, such capital being estimated in the manner provided by the said recited indenture of partnership: Provided always, that if at the end of the said term of fourteen years, or the sooner determination of the said partnership, it shall appear, upon taking the said final account, that the share of the said *R. Driver* and *S. N. Driver* in the net profits of the said business during the continuance of the said partnership shall not have amounted to the total amount of the annual sums which the said *R. Driver* and *S. N. Driver* shall have received on account of such profits, then, immediately after such final account shall have been taken, the said *R. Driver* and *S. N. Driver* shall refund to the partnership the difference between the amount of the said annual sums and the real amount of their share in the net profits: Provided nevertheless, that the said *R. Driver* and *S. N. Driver* shall not in any event be called on to refund a larger sum than the sum of £2500."

6. Arbitration clause in the usual form.

The Defendants *Neil Bannatyne* and *Francis Pye* respectively advanced to Messrs. *Borrett* and *Hagen* sums of £500 and £1000 upon the terms stated in certain deeds dated respectively the 28th of October, 1868, and the 7th of November, 1868. These deeds were in precisely the same form as Messrs. *Drivers'* draft deed, and were both duly executed.

The total amount of the advances made to Messrs. *Borrett* and *Hagen* towards the £10,000 mentioned in the deeds, including the advances made by the present Defendants, consisted of the sum of £9500.

The Plaintiff *Rodney Pooley* was the holder of several bills of exchange drawn, accepted, or indorsed by the said firm of *Charles Borrett & Co.*, between the years 1868 and 1873, and amounting in the aggregate to about £5000, which bills had been put into circulation for the purpose of raising money for carrying on the business of the firm.

In October, 1873, the firm of *Charles Borrett & Co.* went into liquidation by arrangement, and the Plaintiff then applied to the Defendants for payment of the money due on the bills, on the

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ground that the above-mentioned deeds constituted them partners in the firm. The Defendants, however, repudiated any liability on their part as partners, alleging that they were mere lenders of money upon a "contract in writing" under the *Partnership (Bovill's) Act*, 1865 (28 & 29 Vict. c. 86).

The Plaintiff then brought this action, claiming a declaration that the Defendants were partners in the firm of *Charles Borrett & Co.* from the time of its formation until the date of its going into liquidation, and that the Defendants were liable for all the debts of the firm, and for all bills drawn by or in the name of the firm: also the usual accounts.

The action now came on for trial.

The case involved several complicated questions of fact, but as these would be immaterial if the Court decided in favour of the Plaintiff on the question of law raised by the deeds, his Lordship directed that, by analogy to Rules of Court, 1875, Order XXXIV., rule 2, the question of law should be first disposed of.

Argument.

Charles Russell, Q.C., *Ince*, Q.C., and *W. S. Owen*, for the Plaintiff:—

It is clear on the face of this deed—taking Messrs. *Driver's* deed as a sample—that it was not intended to be simply a security for the advance, but to go further, and to give the lenders a share in the profits of the business. The different clauses in the deed contain all the elements of partnership. The transaction is a mere sham—an attempt to evade the Act: *Ex parte Mills* (1).

As regards Messrs. *Driver*, they are clearly not protected by the *Partnership (Bovill's) Act*, 1865 (28 & 29 Vict. c. 86), there being no "contract in writing" under the 1st section.

[*Thesiger*, Q.C., for Messrs. *Driver*:—In *Lindley* on Partnership (2) it is said that to entitle a person lending money to a firm to the benefit of the Act, although there must be a contract in writing, yet it is not necessary that such contract should be signed.]

[JESSEL, M.R.:—I rule that as no one signed this contract, it

(1) Law Rep. 8 Ch. 569. (2) 3rd Ed. p. 47.

is not "a contract in writing with a person" within the 1st section of the Act. However, though unsigned, it is admissible as shewing the terms upon which the advance was made.]

The whole scope of the deed shews that the lenders were interested in the business, *quâ* business, and that it was in fact a contract of partnership. Where persons under the guise of a simple arrangement between debtor and creditor are really trading as principals, and putting forward as ostensible traders others who are really their agents, they cannot by such a device escape liability: *Mollwo, March, & Co.* v. *Court of Wards* (1).

The case falls entirely within *Cox* v. *Hickman* (2), where it is said that the test whether a person is in law a partner is whether he is entitled to participate in the profits. If the ostensible partners carry on the business so that the dormant partners—as we say these Defendants are—may get a share of the profits, the former must be to some extent, at least, the agents of the latter, and that is cogent evidence that the latter are in fact partners: *Kilshaw* v. *Jukes* (3).

To bring the case within the Act, the contract must shew on the face of it that the transaction is one of loan, and nothing more: *Syers* v. *Syers* (4). Although a participation in profits may not of itself constitute a partnership, yet the whole of the instrument must be taken into consideration: *Bullen* v. *Sharp* (5); *Lindley* on Partnership (6); and we submit that this deed is in reality a partnership deed, and that upon the face of it the ostensible partners are, in truth, carrying on the business not only for themselves but for concealed partners.

[JESSEL, M.R., mentioned *Stocker* v. *Brockelbank* (7).

Thesiger, Q.C., *Cookson*, Q.C., and *Millar*, for the Defendants, Messrs. *Driver*:—

The question, as far as we are concerned, is whether, according to the law, independently of the statute, we are partners.

It is difficult to formulate any criterion of true partnership, but

(1) Law Rep. 4 P. C. 419, 438.
(2) 8 H. L. C. 268, 306, 312, 313.
(3) 3 B. & S. 847. 9 Jur. N.S. 1231,
(4) 1 App. Cas. 174.
(5) Law Rep. 1 C. P. 86.
(6) 3rd Ed. p. 46, n.
(7) 3 Mac. & G. 250.

(7) 8 Jur. N.S. 165.

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we submit that none of the definitions given in *Lindley* (1) are applicable to our case.

[JESSEL, M.R.:—I think it may be taken as established by the authorities, that, in the absence of something in the contract to shew a contrary intention, the right to share profits, as profits, constitutes, according to English law, a partnership. I cannot find, as far as I can see, a single authority which conflicts with that proposition.]

It seems clear that the mere fact of sharing profits does not raise an irrebuttable presumption that those who share them are the principals of those who make them: *Lindley* (2). It is only an element in the case, which it is for the Court, sitting as a jury, to consider. Although the right to participate in profits is a strong test of partnership, yet whether that relation actually exists or not, must depend on the real intention and contract of the parties: *Mollwo, March, & Co.* v. *Court of Wards* (3); *Kilshaw* v. *Jukes* (4); *Holme* v. *Hammond* (5).

The question then is, whether the various clauses of this deed are such as to shew that our position is that of partners, and not simply that of lenders, that is, whether the business was really carried on by the admitted partners, *Borrett* and *Hagen*, for the benefit of themselves and these Defendants. We submit that this deed does not create a partnership: the transaction is that of a loan spread over fourteen years, and the real object of the deed is to create a security for the repayment of that loan. The transaction may, upon the terms of the deed, be a speculative one, but it does not necessarily follow that it establishes a partnership. The effect of the *Partnership Act*, 1865, is that, as respects the classes of persons protected by it, the sharing in profits shall be no evidence at all of a contract of partnership: *Holme* v. *Hammond* (6).

There is one very material right which the deed does not give us, and which a dormant partner would have, and that is, an aliquot share of the assets. Under the old practice we could not have filed a bill as partners, asking, that is, for accounts, for sale of the partnership as a whole, and for payment of an aliquot share

(1) 3rd Ed. pp. 2, 3.
(2) Ibid. 41.
(3) Law Rep. 4 P. C. 419, 435.
(4) 3 B. & S. 860, 867.
(5) Law Rep. 7 Ex. 213, 226.
(6) Ibid. 227.

of the proceeds. To make out a partnership it is necessary to establish the relationship of principal and agent between the parties: *Holme* v. *Hammond* (1); *Shaw* v. *Galt* (2).

In the present case the deed fails to shew that *Borrett* and *Hagen* carried on this business as agents for us as principals. The deed shews nothing more than this, that we were to have a share of the profits, and we submit that neither in fact nor in intention are we partners with *Borrett* and *Hagen*.

Argument.

Chitty, Q.C., and *J. C. Mathew*, for the Defendants, *Bannatyne* and *Pye*, adopted the same line of argument, and cited *Re English and Irish Church and University Assurance Society* (3) as an authority that the test of partnership is not simply whether the alleged partner is to receive a share of profits, but whether he constituted his alleged co-partners his agents for carrying on business.

They further insisted that the clauses of the deed were subsidiary and subordinate to the transaction of loan, and did not go so far as to disclose an intention of creating a partnership.

They also mentioned *Ross* v. *Parkyns* (4).

JESSEL, M.R.:—

Judgment.

The real question I have to decide in this case is, whether certain contracts, which are admitted to have been entered into, made the Defendants partners in the firm of *Charles Borrett & Co.* If they did, then the Plaintiff, the holder of certain bills of exchange drawn or indorsed by that firm—whether he gave value for them or not is admittedly immaterial—is entitled to the relief which he asks: if not, the action must be dismissed.

Now, first of all, I must decide the question as to what sort of evidence I must rely upon to prove the partnership. I am not going to define a partnership. The attempt has been made by very many people, and some of the attempts are collected together in the well-known book by Mr. *Lindley*, now Mr. Justice *Lindley*. At pages 2 and 3 of the 3rd Edition he gives fifteen definitions of partnership by different learned lawyers: I think no two of them exactly agree, but there is considerable agreement amongst them;

(1) Law Rep. 7 Ex. 218, 227, 230.
(2) 16 Ir. C. L. Rep. 357, 375.
(3) 1 H. & M. 85.
(4) Law Rep. 20 Eq. 331.

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and I suppose anybody reading the fifteen may get a general notion of what partnership means. But I am not left to decide this case on any notions of my own of what is a partnership. Whatever may amount to a partnership is a subject which has been settled by decision according to English law, and the incidents of the partnership simply follow from the establishment of the fact of the partnership. If the partnership is established as a fact, then the liability to creditors is a mere incident flowing from the establishment of the fact. But it is a contract of some kind undoubtedly—a contract, like all contracts, involving the mutual consent of the parties: and it is undoubtedly a contract for the purpose of carrying on a commercial business—that is, a business bringing profit, and dividing the profit in some shape or other between the partners. That certainly partnership is. Whether it is anything more or not has been a question between various authorities, but it is that certainly.

The Civil Code of *New York*, which contains the first definition quoted, gives this as a definition: "Partnership is the association of two or more persons for the purpose of carrying on business together and dividing its profits between them." It undoubtedly is that. Whether it is that and something more is a question of consideration, some writers adding qualifications which are not to be found in that definition, and others excepting out of it even the community of profit; but it is at least that. There could not be a partnership without there was a commercial business to be carried on with a view to profit and for division of profits; and as a general rule, I take it, if it fulfils that definition, it is a partnership. I say, as a general rule, that simple definition appears, so far as it goes, to be an accurate definition.

Then whether or not the association requires that one or more of the partners shall contribute labour or skill, or what they shall contribute, is a question which may be considered as subsidiary; but I take it that the ordinary meaning of the word "partnership" is that, no doubt as a rule, each partner does contribute something, either in the shape of property or skill. But it is not a universal rule, and therefore the definition of Chancellor *Kent*, which is given in the same page, is not quite correct. He says: "Partnership is a contract of two or more competent persons to place their

money, effects, labour, and skill, or some or all of them, in lawful commerce, or business . . ."

You can have, undoubtedly, according to English law, a dormant partner who puts nothing in—neither capital, nor skill, nor anything else. In fact, those who are familiar with partnerships know it is by no means uncommon to give a share to the widow or relative of some former partner who contributes nothing at all, neither name, nor skill, nor anything else. Therefore it is not quite accurate, as Chancellor *Kent* puts it, that they must contribute labour, skill, or money, or some or all of them.

Then *Pothier* has a definition in which he says it is "a contract by which two or more people put, or contract to put, in common something to make in common an honest profit, which they pledge themselves to render an account of to one another." *Pothier* has the words "an *honest* profit (*un profit honnête*)." The *New York* definition, oddly enough, says "carrying on business;" of course the business might be that of highwayman, and that could hardly have been meant by the framers of the *New York* Code, and I must assume that they meant some honest calling, which is supplied by *Pothier's* definition. It shews that even in the most accurate definitions inserted in a Code something must be supplied which is not expressed.

Then *Pothier* says they must have "something in common (*en commun quelque chose*)," but, as I said before, that is not necessary according to the English notion of partnership. The dormant partner may put in nothing whatever, as in the case of the widow or child of a deceased partner; therefore that shews again the enormous difficulty of giving a definition which shall be applicable to all cases. As I have already said, the *New York* definition, with the words I have put into it, will certainly be sufficient for this purpose, without considering whether it is accurate in every respect; and I may again say that, although one of the definitions speaks of a community of loss, as a rule they do not.

This association which I have to consider certainly comes within about twelve out of the fifteen definitions, therefore *primâ facie* this is a partnership according to those definitions.

But that is not alone enough: there is authority which tells me how to find out whether a certain contract is a partnership or not.

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If we find an association of two or more persons formed for the purpose of carrying on in the first instance, or of continuing to carry on business, and we find that those persons share between them generally the profits of that business, as I understand the law of the case as laid down by the highest authority, those persons are to be treated as partners in that business unless there are surrounding circumstances to shew that they are not really partners.

That, of course, brings me again to another question, which must always be considered, and that is, whether, looking at the contract as a whole, it is intended to secure the benefit of a partnership with or without its liabilities; or whether it is not intended that the benefits of a partnership shall be secured.

I do not know that I can put it better than it is put in the case of *Mollwo, March, & Co.* v. *Court of Wards* (1), "If cases should occur where any persons, under the guise of such an arrangement," that is, the guise of an arrangement as creditor and debtor, "are really trading as principals, and putting forward, as ostensible traders, others who are really their agents, they must not hope by such devices to escape liablity; for the law, in cases of this kind, will look at the body and substance of the arrangements and fasten responsibility on the parties according to their true and real character." It is a question of substance and not of mere form.

The leading case on the subject, and the one which, being of the highest authority, is of course binding upon me, is the case of *Cox* v. *Hickman* (2), before the House of Lords. In a carefully considered judgment their Lordships were unanimous, although the Judges who were consulted—a considerable number—were almost equally divided. I need not state the case, because everybody acquainted with the law on the subject is familiar with it. There was in that case what has been called a limited participation in profits, that is, the trustees for the creditors were authorized to carry on the trade and to apply the profits so obtained, as well as the results of selling or disposing of the business, in payment of their debts. Of course the creditors could get no more than their debts. Lord *Campbell* says (3): "Is there here such a participation

(1) Law Rep. 4 P. C. 438. (2) 8 H. L. C. 268.
(3) 8 H. L. C. 302.

in the profits of the new firm"—the new firm of the trustees—"by the creditors of the old firm, as to make them partners in the new firm? They certainly are not partners *inter se*, as was properly held by the Master of the Rolls, and they could derive no profit from the new business, beyond the payment of the debts due to them from the old firm. There was a formal release of these debts; but we must look at the real nature of the transaction, according to the understanding of all who were parties to it. The business of Messrs. *Smith & Co.* was to be carried on by the trustees till the debts of that firm were paid, and then the business was to be transferred back to Messrs. *Smith & Co.*" Then Lord *Campbell* goes on to consider that. Of course if the creditors of the old firm were liable at all, they could only be liable on the theory that the trustees were their agents to carry on the business; if they were partners that would follow as a conclusion of law.

The next Lord who made a speech, Lord *Cranworth*, put it in this way (1): "It is often said that the test, or one of the tests, whether a person, not ostensibly a partner, is nevertheless, in contemplation of law, a partner, is, whether he is entitled to participate in the profits. This, no doubt, is in general a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive evidence, that the trade in which the profits have been made, was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is, that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on on his behalf, *i.e.*, that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made."

Now what Lord *Cranworth* means there is quite plain. He

(1) 8 H. L. C. 306.

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says in fact that the participating in the profits is sufficient proof of partnership if there is nothing to get rid of it. If you find an association, and a contract made by the members of the association that the trade is to be carried on, and that they are to share the profits in certain proportions, then that makes a partnership, unless you can shew from the surrounding circumstances some other relation. It is not impossible to shew some other relation, but, as he says, it is very difficult to do so. It is often conclusive by itself—not always.

Then Lord *Cranworth* goes on to speak of agency, and I am almost sorry that the word "agency" has been introduced into this judgment, because of course everybody knows that partnership is a sort of agency, but a very peculiar one. You cannot grasp the notion of agency properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners; a notion which was well grasped by the old Roman lawyers, and which was partly understood in the Courts of Equity before it was part of the whole law of the land as it is now. But when you get that idea clearly you will see at once what sort of agency it is. It is the one person acting on behalf of the firm. He does not act as agent, in the ordinary sense of the word, for the others so as to bind the others; he acts on behalf of the firm of which they are members; and as he binds the firm and acts on the part of the firm, he is properly treated as the agent of the firm. If you cannot grasp the notion of a separate entity for the firm, then you are reduced to this, that inasmuch as he acts partly for himself and partly for the others, to the extent that he acts for the others he must be an agent, and in that way you get him to be an agent for the other partners, but only in that way, because you insist upon ignoring the existence of the firm as a separate entity.

That being so, you do not help yourself in the slightest degree in arriving at a conclusion by stating that he must be an agent for the others. It is only stating in other words that he must be a partner, inasmuch as every partnership involves this kind of agency: or, if you state that he is agent for the others, you state that he is a partner.

The question of course is whether a man is liable as a dormant

partner. Now a dormant partner means a person who does not take an active part in the conduct of the business, and who may be, and often is, prohibited from taking such active part. Therefore, when the inquiry is whether a man is a dormant partner, it does not appear to me to aid that inquiry by saying that there are provisions preventing his taking an active part in the conduct of the business, or that there are provisions which make it optional for him to take an active part in the business or not. It only shews he is not an active partner. Upon that there is an observation of Lord *Cranworth's* (1): "I can find no case in which a person has been made liable as a dormant or sleeping partner, where the trade might not fairly be said to have been carried on for him, together with those ostensibly conducting it, and when, therefore, he would stand in the position of principal towards the ostensible members of the firm as his agents." Then he discusses the well-known case of *Waugh* v. *Carver* (2), where, as has been said in some other cases, a better reason existed for the decision than was given by the Judges who decided it.

The only other speech to which I think it necessary to refer is the speech of Lord *Wensleydale* (3). He says: "The law as to partnership is undoubtedly a branch of the law of principal and agent; and it would tend to simplify and make more easy of solution, the questions which arise on this snbject, if this principle were more constantly kept in view. Mr. Justice *Story* lays it down in the first section of his work on Partnership. He says, 'Every partner is an agent of the partnership'"—now there it is laid down in so many words, in the House of Lords, that that is what he is agent for—"'and his rights, powers, duties, and obligations, are in many respects governed by the same rules and principles as those of an agent; a partner virtually embraces the character of both a principal and agent' . . . A man who allows another to carry on trade, whether in his own name or not, to buy and sell, and to pay over all the profits to him, is undoubtedly the principal, and the person so employed is the agent, and the principal is liable for the agent's contracts in the course of his employment. So, if two or more agree that they should carry on

(1) 8 H. L. C. 309. (2) 2 H. Bl. 235.
(3) 8 H. L. C. 312.

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a trade, and share the profits of it, each is a principal, and each is an agent for the other, and each is bound by the other's contract in carrying on the trade, as much as a single principal would be by the act of an agent, who was to give the whole of the profits to his employer. Hence it becomes a test of the liability of one for the contract of another, that he is to receive the whole or a part of the profits arising from that contract by virtue of the agreement made at the time of the employment. I believe this is the true principle of partnership liability."

That is the test. Of course Lord *Wensleydale* does not mean that it is a test which cannot be rebutted; it was rebutted in the case before him. His Lordship then continues: "Perhaps the maxim that he who partakes the advantage ought to bear the loss, often stated in the earlier cases on this subject, is only the consequence, not the cause, why a man is made liable as a partner." Then he goes on to state the reasons why he thinks in the case before him there was no contract of partnership.

The other case, which is again a very great authority, though perhaps not so directly binding upon me as the case in the House of Lords, is the case of *Mollwo, March, & Co.* v. *Court of Wards* (1). In that case there were three points taken. The first point—which does not occur here, as I have shewn—was that the rajah, who was Respondent in that case (or rather his heirs) was (2) "not entitled to a share of the profits 'as such;' he had no specific property or interests in them *quâ* profits, for, subject to the powers given to the rajah by way of security, the *Watsons* might have appropriated or assigned the whole profits without any breach of the agreement. The rajah was entitled only to commission, or a payment equal in proportion to one-fifth of their amount. This distinction has always been admitted to be thin." Sir *Montague Smith* states what is the distinction which exists, namely, to participate in profits "as such," and the right to a payment in proportion to a given quantum of profits. I may say that in one of the cases which have been referred to, *Re English and Irish Church and University Insurance Society* (3), Lord *Hatherley*, then Vice-Chancellor *Wood*, takes the distinction to be established, and in

(1) Law Rep. 4 P. C. 419. (2) Law Rep. 4 P. C. 434.
(3) 1 H. & M. 85.

several other cases also following the case of *Cox* v. *Hickman* (1) the distinction is considered to be clear law.

Then the second point in the case before the Privy Council is thus stated in the judgment (2): "But the necessity of resorting to these fine distinctions has been greatly lessened since the presumption itself lost the rigid character it was supposed to possess after the full exposition of the law on this subject contained in the judgment of the House of Lords in *Cox* v. *Hickman* and the cases which have followed that decision." "Rigid character"—that is, the presumption was supposed to be irrebuttable, and all the House of Lords decided was that you could rebut it under certain circumstances; but the very case that they decided was a case, not of an indefinite sharing of profits, but of a sharing of profits to a limited extent in accordance with the amount of the debts.

Sir *Montague Smith* proceeds: "It was contended that these cases did not overrule the previous ones." I must say that the House of Lords, when deciding *Cox* v. *Hickman*, expressed their intention of not overruling the previous cases. "This may be so, and it may be that *Waugh* v. *Carver* (3), and others of the former cases, were rightly decided on their own facts; but the judgment in *Cox* v. *Hickman* had certainly the effect of dissolving the rule of law which had been supposed to exist, and laid down principles of decision by which the determination of cases of this kind is made to depend, not on arbitrary presumptions of law, but on the real contracts and relations of the parties. It appears to be now established that, although a right to participate in the profits of trade is a strong test of partnership, and that there may be cases where, from such perception alone, it may, as a presumption, not of law but of fact, be inferred; yet that whether that relation does or does not exist must depend on the real intention and contract of the parties."

Then the same learned Judge says (4): "It may well be, that where there is an agreement to share the profits of a trade, and no more, a contract of partnership may be inferred, because there is nothing to shew that any other was contemplated; but that

(1) 8 H. L. C. 268.
(2) Law Rep. 4 P. C. 434.
(3) 2 H. Bl. 235.
(4) Law Rep. 4 P. C. 437.

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is not the present case, where another and different contract is shewn to have been intended, viz., one of loan and security."

It is hardly necessary to refer to any of the other authorities on the point, because those two authorities settle the law, and, as far as I am concerned, put an end to all discussion.

There is, however, a passage in the case of *Kilshaw* v. *Jukes* (1) which I think is worth referring to. It is in the judgment of Mr. Justice *Blackburn*, who says (2): "It is true that the supposed case is one in the usual course of trade, whilst such a transaction as the present is rather out of the ordinary course of business; and that there always is a possibility that a person who is really a partner may endeavour to cloak his interest by an apparent arrangement of this sort. These were fair topics for the consideration of the jury, and were no doubt urged upon them by the counsel for the Plaintiff." So that Mr. Justice *Blackburn* treats it as a question of evidence, from which the jury were entitled to draw their conclusion as to what was really intended; and that they having found against the partnership, he was not bound to disturb that conclusion. Then (3) the learned Judge says this, quoting Lord *Cranworth*: "'The debtor is still the person solely interested in the profits . . . He receives the benefit of the profits as they accrue, though he has precluded himself from applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the creditors.' Taking this to be the law, and it was so necessary for the decision in *Cox* v. *Hickman* (4) that I think it must be considered as the decision of the House of Lords, it certainly seems to me to follow that the arrangement which the jury have found to have really existed between *Jukes* and *Till* and *Wynn* did not make *Jukes* liable to the Plaintiff on the contract which the other two made for the purchase of the timber. It is not necessary in this case to consider how far the older cases are overruled by the decision in *Cox* v. *Hickman*, for it seems to go far enough, at least, to decide this case."

There is only one more passage which I wish to read from the

(1) 3 B. & S. 847. (3) 3 B. & S. 868.
(2) Ibid. 865. (4) 8 H. L. C. 268.

authorities, and that is from the case of *Re English and Irish Church and University Assurance Society* (1), a decision by Vice-Chancellor *Wood*: "If you employ *A. B.* to enter into a contract on your behalf, you become liable in respect of that contract, he being your agent; and it may well be, that, in the absence of any stipulation to the contrary, you make him your agent by taking part of the profits of the adventure; and it is on that footing that participation in profits comes to be regarded as a test of partner or no partner; but the real test is, whether the parties who carry on the business are constituted your agents in contracting liabilities in respect of it." Therefore the Vice-Chancellor entirely agrees that participation in profits is a proper test and a sufficient test, if there is nothing to override it.

I may cite further from page 45 of the third edition of Mr. *Lindley's* book, considering that learned gentleman is now a Judge, the conclusion that he comes to as to the effect of the case of *Cox* v. *Hickman* (2)—"that *primâ facie* the relation of principal and agent is constituted by an agreement entitling one person to share the profits made by another to an indefinite extent; but that this inference is displaced if it appears from the whole agreement that no partnership or agency was really intended."

I think, therefore, the law is so far settled that I ought to have no great difficulty in applying it to the case before me. Before going into the deeds at length, I will consider the effect of them.

In October, 1868, *Borrett* and *Hagen* agree to become partners in carrying on the business together of grease, pitch, and manure manufacturers. *Borrett* had carried it on before alone, but he and *Hagen* now made an arrangement of partnership. The arrangement in substance was this: that they should contribute certain shares of the capital, and should give their services in order to carry on the business; that the rest of the capital should be contributed by other persons who were disposed to come forward under the provisions of the Act to which I shall call attention presently—the Act which is commonly called Lord Chief Justice *Bovill's* Act—and then that the capital should be divided in certain proportions, giving everybody who put in £500, amongst those other contributors, a share in the capital in proportion, and

(1) 1 H. & M. 85, 106. (2) 8 H. L. C. 268.

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a share in the profits indefinitely. When the partnership is wound up this capital is to be paid back preferentially. The contributors were to take their share of the profits, but if it turned out that, on taking a final account, the profits of any years which had been paid, being added together, exceeded the total profits made from the business, the contributors were to pay back the excess, not exceeding in any event the amount they had contributed, and of course not exceeding in any event the amount they had received in profits.

That is the substance of the deeds; but besides that, there were a great many of the provisions usually inserted in partnership deeds, and every one of those provisions was extended to the contributors; that is to say, if they had been ordinary dormant partners, those provisions would have been inserted in their favour, and would have given them every right which, as far as I can understand, an ordinary dormant partner would have. I put it to the learned counsel, in the course of the argument, whether they could suggest any right which would be given to an ordinary dormant partner, not possessed by these contributors, and after consideration and discussion they were unable to do so. That is the general effect of the deeds.

That, then, is the position of the parties. The partnership was for the term of fourteen years; the loan also was for the same term. If the partnership comes to an end sooner, the loan must come to an end sooner; so that, in fact, if you were to describe the contributors as dormant partners in the concern, liable to a limited extent to loss, and with a guarantee of their capital from the active partners, you would exactly describe their position; and I do not know of any other shorter mode of describing the position of these contributors.

Well, if that is so, is not that exactly the thing which it was intended should not take place—that a man should not put forward another to carry on the business ostensibly and himself take the profits? It is the very object and meaning of the transaction, as I understand it, to give these contributors that very position which dormant partners usually occupy, with certain collateral advantages—exceptional, perhaps, but not altogether unusual; unusual, no doubt, in the sense that I have seldom seen

—I was going to say so barefaced, but, when you come to see the reason of it, I will say so palpable—an intention exhibited on the face of the documents to give the contributors all the benefits of the partnership, and if possible to secure them from suffering from the liabilities. The reason of it was this: The framers of the instrument thought that *Bovill's Act* would protect them, and that comes again to a question of law, as to whether the Defendants who executed the deeds are in a better position than the Defendants who did not.

First of all, as to the Defendants who did not. I decided yesterday, and I merely repeat it, that Messrs. *Driver*, not being parties to any instrument in writing signed by them, were not parties to a "contract in writing" within *Bovill's Act*, and therefore could not have the benefit or protection afforded by that Act. But, with regard to the Defendants who did execute the deeds, of course they would be entitled to the benefit of the *Act*, and then the mere question I have to try is whether they have rightly construed the Act.

It was said, and said with considerable force, by Mr. *Chitty* and Mr. *Mathew*, that they never intended to be partners. What they did not intend to do was to incur the liabilities of partners. If intending to be a partner is intending to take the profits, then they did intend to be partners. If intending to take the profits and have the business carried on for their benefit was intending to be partners, they did intend to be partners. If intending to see that the money was applied for that purpose, and for no other, and to exercise an efficient control over it, so that they might have brought an action to restrain it from being otherwise applied, and so forth, was intending to be partners, then they did intend to be partners. But if it is tried by the other test, whether they intended to be protected under *Bovill's Act* from liability to third persons, then I think they did intend to be protected from liability.

But it comes back again to the same point, namely, what is the true construction of the Act? Is what they did within the provisions of the Act, or without?

I must say the Act is not so easy to construe as some Acts are, and not so difficult as some Acts are; but it seems to have been

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framed on an impression that the law of partnership was in a different state from what it actually was. I should be sorry to say that on my own authority, but I find it stated in pretty plain terms by the Privy Council in the case of *Mollwo, March, & Co.* v. *Court of Wards*, and something of the same kind was stated by other Judges, but being Judges of Courts of first instance, I do not refer to them. The Privy Council said (1): "Some reliance was placed on the statute 28 & 29 Vict. c. 86, s. 1, which enacts that the advance of money to a firm upon a contract that the lender shall receive a rate of interest varying with the profits, or a share of the profits, shall not, of itself, constitute the lender a partner, or render him responsible as such. It was argued that this raised an implication that the lender was so responsible by the law existing before the passing of the Act. The enactment is no doubt entitled to great weight as evidence of the law, but it is by no means conclusive; and when the existing law is shewn to be different from that which the Legislature supposed it to be, the implication arising from the statute cannot operate as a negation of its existence."

Now, I am afraid that that criticism is by no means ill-founded. The first section of the Act is this: "The advance of money by way of loan to a person engaged, or about to engage, in any trade or undertaking upon a contract in writing with such person, that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on such trade or undertaking, shall not, of itself, constitute the lender a partner with the person or the persons carrying on such trade or undertaking, or render him responsible as such."

The law was decided before the Act, by a long train of decisions before the time of Lord *Eldon*, who found it established. He says in *Ex parte Hamper* (2) that the lending of a sum of money on a *bonâ fide* contract to receive a rate of interest varying with the profits, did not make a man a partner; although, I suppose, I may take it to be the equally well-established rule, though perhaps not so conclusively established, that the receiving of a share of the profits did: the two were lumped together by the statute, and therefore it was said, and rightly said, that there being, so to say,

(1) Law Rep. 4 P. C. 437. (2) 17 Ves. 403.

a misapprehension of the law which was supposed to be affected by the Act, you cannot look upon the Act itself as declaratory one way or the other.

That being so, what is the effect of the Act? The Act is this, that the advance of money must be "by way of loan." Now what does that mean? It is not the "advance of money," but "the advance of money by way of loan." I take it to mean this, that the person advancing must be a real lender; that the advance must not only profess to be by way of loan, but must be a real loan; and consequently you come back to the question whether the persons who enter into the contract of association are really in the position of creditor and debtor, or in the position of partners, or in the only third position which I think could be suggested, that of master and servant. But the Act does not decide that for you. You must decide that without the Act; and when you have decided that the relation is that of creditor and debtor, then all the Act does is this: it says that the creditor may take a share of the profits, but, as I understand the law as laid down by the higher authorities to which I have referred, if you have once decided that the parties are in the position of creditor and debtor you do not want the Act at all, because the inference of partnership derived from the mere taking a share of profits, not being irrebuttable, is rebutted by your having come to the conclusion that they are in the position of debtor and creditor. That, in fact, was the decision in the case of *Mollwo, March, & Co.* v. *Court of Wards* (1), and in the case of *Cox* v. *Hickman* (2). Therefore you have already decided that for yourself, and the Act does not seem to me, as far as regards the first section, to do you any good at all.

Then the only other point is as to the meaning of "shall not, of itself, constitute," &c. Now there is a possible meaning to be given to the word "itself." It may mean this—though I am not sure that it does—that in construing a contract which, before the Act, by the mere circumstance of there being a share in the profits, would have raised a cogent, though not an irrebuttable, inference that the so-called lender was a partner, though he professed to be a lender, the mere fact of his taking profits shall not alone raise that inference. Well, if that is the meaning—and I

(1) Law Rep. 4 P. C. 419. (2) 8 H. L. C. 268.

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think Mr. *Lindley* attributes that meaning to it—it does not assist me very much in coming to a decision, for of course in this case there are many other circumstances besides participation in profits, as I suppose there are always, or nearly always, in these cases; and in the next place, as I said before, I must decide for myself whether the parties are really in the position of creditor and debtor before I can apply the Act at all.

The words are, "advance of money by way of loan," and Mr. *Lindley's* note (1) is this: "Observe these very important words. Agreements are constantly framed with all sorts of clauses, which together probably expose the lender to the risks he is desirous of avoiding"—that is, to the risk of being a partner. I do not know why those words, "of itself," were put into the Act, unless it was supposed by the framer—which is another guess of my own, and one which, perhaps, I ought not to make, because it is imputing to the Legislature a further ignorance of law besides that already imputed to them in the Privy Council case—that sharing profits would otherwise have created a partnership of itself. If you take that meaning, then it is an alteration of the law; but *Cox* v. *Hickman* (2) decided that that was not so, and never had been so, for of course *Cox* v. *Hickman* did not lay down any new law—the Lords say so in their speeches—and, consequently, it was not true that at any time sharing profits constituted a lender a partner, though it was a cogent test for trying the question, and would have been irrebuttable unless you could have found some circumstances altering the nature of the contract.

That disposes of the law of the case as far as I am concerned. I now come to the consideration of the details of the documents, which are certainly framed in a very singular way. They seem to me to have been purposely framed with a view of giving the whole benefit which partnership could give to the contributors, and, if possible, something more than they could have obtained as partners.

The original deed of partnership is dated the 10th of October, 1868: it is made between *Borrett* of the one part, and *Hagen* of the other. It states that they agreed to become partners "on the terms hereinafter mentioned;" then it states what the trade

(1) 3rd Ed. p. 46. (2) 8 H. L. C. 268.

should be, namely, the business of a grease, pitch, and manure manufacturer; then the partnership is to commence on the 1st of July, 1868, and is to continue for the term of fourteen years next ensuing, and to be carried on in the name of *Borrett & Co.*

The capital of the partnership consists of £30,000, and is made up as follows: the goodwill—that is, the business already carried on—is to be taken at the value of £15,000; *Borrett* is to bring in a further sum of £1000, *Hagen* a further sum of £4000, and the remaining £10,000 is to be raised "by way of loan" under the provisions of the Act (giving its full title), "in sums of £500 each from persons willing to advance the same for the purpose of the said partnership; and the said capital shall be considered as divided into sixty equal parts of £500 each; and the said *Charles Borrett* shall be considered as the owner of seventeen of such parts, and the said *Edward Hagen* as the owner of twenty-three of such parts, making together forty equal parts or shares of £500 each held by them in the said business; and the remaining twenty equal parts or shares shall be considered as appropriated to or for the benefit of the person or persons so advancing money by way of loan as aforesaid on the proportion on which the same shall be advanced by them respectively."

So that the moment the contributors became parties to this deed, as I shall shew they were or did become afterwards, they became entitled to shares in the capital absolutely. Then it goes on, "The capital of the said business shall be used and employed in the regular course of trade for the benefit of the partnership, and shall not be drawn out during the continuance of such partnership."

This is a very important clause, when you consider that the contributors get the benefit—as I shall shew presently they do—of every covenant in the deed of partnership. The result, therefore, is this, that they became not only entitled to the shares of the capital, but entitled to compel the ostensible partners to employ that capital in the regular course of trade, and might have obtained an injunction to prevent their diverting it to any other purpose. They had therefore, to that extent, a control over the capital, namely, a control over its employment; thus they were not at all in the ordinary position of lenders.

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The lender does not become entitled to any part of the assets of his debtor in specie. He has only a contract which entitles him to claim payment from the debtor as a personal demand, but this supposed creditor becomes entitled to a portion of the capital in specie, and gets the right besides to prevent the legal owners of the property from applying it to any other than a particular purpose, whether they desire to do so or not. He acquires two rights, the right to an aliquot portion of the capital itself, and a right to control the disposal of the rest of the capital.

Then there is a covenant that the partners shall conduct the business during the partnership to the best of their ability. Let us test the case by that covenant. The lender can compel these people against their will to carry on the business—I do not mean to say he can actually make them carry on the business, because that is a covenant which a Court of Equity always declines to enforce, but he could have an action for damages against them for breach of the covenant, and at all events he gets the benefit of that contract. They must carry on the business, as I shall shew presently, for his benefit, because they have contracted to do so.

Then the 7th clause is that proper books of account and other books shall be kept in the usual way. Then there is a provision that the partners shall not sell, lend, or borrow without mutual consent; then that they shall not allow the assets to be taken in execution; and then that neither partner shall take any servants without the consent of the other. Then there is a provision as to outgoings; then a provision for one of the ostensible partners drawing out certain sums for maintenance. Then, that on the 1st of July in every year a general account shall be taken, and a general valuation made in the usual way, and put into a book. Then the 14th clause is this, which is very important:—[His Lordship read it.]

The moment the contributors got the benefit of this they were clearly entitled to a share of the profits as profits. Nothing can be plainer than the terms of the provision, and it shews the intention of the parties.

Then the 15th clause is this:—[His Lordship read it.] Then there is a provision to this effect, that if either of the partners becomes bankrupt the other shall have liberty to dissolve, and

then the property shall become the property of the non-bankrupt partner upon his paying the value of the bankrupt partner's share to his assignees.

Then there is a provision for the widow or children of the partners; then a provision in the event of the death of either partner, which I do not think it necessary to read, and some other provisions as regards death, which precede the last clause, which is the usual arbitration clause. That is the partnership deed.

Now we come to the other deeds, which for this purpose I treat as deeds of even date. They are not exactly of even date, but they are nearly contemporaneous. The partnership dates from the 10th of October, 1868. The arrangement made with Messrs. *Driver* was made somewhere about the same time, and was made by a document which was never executed. It was a draft of an indenture dated the day of October, 1868. I may say, in passing, that the other deeds, those executed by *Bannatyne & Pye*, are about the same date—one being dated the 28th of October, 1868, and the other the 7th of November, 1868—and are in the same terms, and I will take them as having been executed shortly after the partnership.

Messrs. *Driver's* document recites the partnership deed; it recites some of the provisions that I have read; and then it goes on: "Whereas the said *Rolles Driver* and *Samuel Neale Driver* have agreed to advance by way of loan to the said *C. Borrett* and *E. Hagen*, under the provisions of an Act of Parliament passed in the 28th and 29th years of Her present Majesty, c. 86, entitled, '*An Act to amend the Law of Partnership*,' the sum of £2500, to enable them the said *C. Borrett* and *E. Hagen* to carry on the said trade or business for the term and under and subject to the stipulations and conditions hereinafter mentioned, expressed, and declared concerning the same." Then it is witnessed, "That in consideration of the sum of £2500," &c., the said *Borrett* and *Hagen* first of all covenant that they, *Borrett* and *Hagen*, "will within six calendar months after the 1st of July, 1882, or within six calendar months after the sooner determination of the said partnership, pay unto the said *Rolles Driver* and *Samuel Neale Driver*, their executors, administrators, or assigns, the sum of £2500."

That is a very remarkable thing for a loan. It is a loan during

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the continuance of the partnership. It is to be paid within six calendar months after its natural expiration, or within six months after any other expiration of the partnership. Therefore, although they call it a "loan," and although I agree that, standing alone, the fact of the duration of the loan being the duration of the partnership might not of itself be conclusive, it all tends in the same way to shew that this was really intended as an advance of capital to the partnership business, made for the purpose of carrying it on, and not as an ordinary loan.

The next clause—and this is very important—is: "That the said *C. Borrett* and *E. Hagen*, their respective executors and administrators, shall in all things conform to, fulfil, and observe the covenants, clauses, and agreements contained in the said recited deed of partnership of the 10th day of October, 1868, and such deed of partnership shall at all times be open to the inspection of the said *Rolles Driver* and *Samuel Neale Driver*, their executors or administrators, at the office where the said business shall be carried on." That imports the whole of the provisions of the prior deed into this deed, and makes *Borrett* and *Hagen* covenant to observe them, thus giving to the *Drivers* those rights both with respect to capital and profits which I have already adverted to.

Then the next clause provides that *Borrett* and *Hagen* will, during the continuance of the loan—that is, during the maintenance of the partnership—make out accounts, and once a year, on the 1st of October, pay Messrs. *Driver*, on account of profits, a sum equivalent to five sixtieth parts of the profits for the year preceding the 1st of July then last past. Some argument was rested upon that, but nothing turns upon it, for this covenant never actually came into existence. If it had, I should have held that it did not vary the case in the least; that the prior clause gave them a share of proceeds as profits under the partnership, and this only makes *Borrett* and *Hagen* pay on account of the profits a sum equivalent to five sixtieth parts, shewing that what they had to pay really was still profits. But that clause never came into force, because there was a proviso at the end of it to this effect, that if the sum of £10,000 was not advanced—and it was not—then *Borrett* and *Hagen*, or one of them, would "on the 1st day of October in every year during the continuance of the said loan

pay to the said *Rolles Driver* and *Samuel Neale Driver*, their executors, administrators, or assigns, in lieu of the said five equal sixtieth parts of the said clear gains and profits as last aforesaid, such a proportion of the said clear gains and profits as last aforesaid as the said sum of £2500 bears to the whole capital for the time being employed in the same business, such capital being estimated in the manner provided by the said indenture of partnership."

So that we have the interest of the loan not varying merely with the profits of the business, but varying in the proportion which the loan, which was part of the capital, bore to the whole capital, a circumstance which I think by no means immaterial in shewing that it was not a genuine loan in the sense of creating the relation of debtor and creditor, but that it was indeed an advance of part of the capital.

Then the deed goes on with a very remarkable provision, "That if either the said *Rolles Driver* or *Samuel Neale Driver* shall become bankrupt or shall compound with his creditors, or in case any difference or dispute shall at any time during the said term of fourteen years arise between the said parties hereto, or their representatives, and which differences or disputes shall be considered by arbitration, as hereinafter mentioned, to justify the determination of the arrangement hereby agreed upon, it shall be lawful for the said *C. Borrett* and *E. Hagen*, or the survivor of them, or their or his executors and administrators at any time hereafter to pay the said sum of £2500, less any sum they shall have been overpaid on account of the said business, to the said *Rolles Driver* and *Samuel Neale Driver*, their executors, administrators, or assigns, together with the share of the said profits (if any) to which the said *Rolles Driver* and *Samuel Neale Driver*, their executors, administrators, or assigns, shall then have become entitled;" and thereupon the agreement is to be at an end.

Now that certainly is a very astonishing provision in an ordinary contract of loan. What has the bankruptcy of the creditor got to do with it? You pay the assignee, or trustee, as he is now called. It is a very remarkable thing that the bankruptcy of the creditor should put an end to the agreement, but you find it by no means remarkable if it was intended that they should really be

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partners. You find a similar provision in the actual partnership deed. Without attaching too much weight to this, I think it is very material.

Then there is another remarkable clause: "Within six calendar months after the expiration or sooner determination of the partnership, a final settlement of the accounts of the partnership shall be forthwith made in writing by the said *C. Borrett* and *E. Hagen*, their executors or administrators, concerning all the stock-in-trade, plant, moneys, credits, and effects then due or belonging to the said partnership estate, and also of all debts and sums of money (if any) due or owing from, and of all liabilities of the same, and a just valuation shall be made of all the particulars included in such account which shall require and are capable of valuation, and immediately after such last-mentioned account shall have been so taken and settled, the said *C. Borrett* and *E. Hagen* shall forthwith pay thereout to the said *Rolles Driver* and *Samuel Neale Driver*, their executors, administrators, or assigns, the sum of £2500." So that the covenant is in accordance with the partnership deed to pay the £2500 out of the assets and debts due to the partnership. I know there is another covenant to pay Messrs. *Driver* which is personal, but there stands a covenant to pay out of the assets.

Then there is a provision for payment to the *Drivers* of "five equal sixtieth parts or shares of all the net profits of the said business." That gives them all the surplus profits that they have not yet received, including the proportion of the capital they are entitled to.

Then there is the proviso that they shall refund. It is very oddly worded, but it is agreed on all hands that it means this, that if, at the end of the partnership period, the amount already paid to the *Drivers* for profits shall exceed the total profits made in the business, they shall refund the excess not exceeding the £2500. I have rather given the effect than the words, because the words are somewhat ambiguous; but it is admitted that that must be the meaning, or, in other words, that the lender, having received profit for interest, if the business afterwards makes a loss, would have to pay back, subject to the limit that he is never to be called upon to pay more than he has received, and,

subject also to this, that he is never to be called upon to pay more than the total amount of his so-called loan. It is certainly a wonderful provision, if it is a *bonâ fide* loan, and not a mere colourable transaction to get a share of the profits without being liable to losses. Did ever any one hear of anybody lending his money on such terms, or of the notion that, after having received the profits in lieu of interest, he is to pay back the whole of them, it may be, because subsequently the business, conducted not for him, but for other people, who are really his debtors, shall have given rise to losses? It appears to me that if you want to prove that the business was conducted for him, this is cogent evidence of it. It was not conducted entirely for the benefit of the persons who were merely debtors and who stood in that relation to the supposed creditor.

Then there is an arbitration clause, which is very usual in partnership articles, but not a very usual one in a mere loan deed.

These are the documents on which I am called upon to decide, and I must say that I have come to a clear conclusion that this is not a transaction of loan within the meaning of the Act of Parliament; that the true relation of the parties towards one another was that of dormant and active partners, and not of mere creditors and debtors; that in this case I need not rely on one provision or on two provisions, but on the whole character of the transaction from beginning to end. It is an elaborate device, an ingenious contrivance, for giving these contributors the whole of the advantages of the partnership, without subjecting them, as they thought, to any of the liabilities. I think the device fails; and that, looking at the law as it stands, I must hold that they are partners, and liable to the consequences of being partners, and to the whole of the engagements of the partnership, and consequently liable for the whole of its debts.

The Plaintiff is, therefore, entitled to a judgment on these bills.

Ince:—This being an action upon bills of exchange, and one which might have been tried in a Common Law Division, and having regard to the fact that by coming here we have avoided the

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expense of a jury, I ask your Lordship to certify for costs on the higher scale: Additional Rules of Court (12th August, 1875), Order VI., rr. 2, 3.

JESSEL, M.R.:—I shall give judgment for the amount of the bills in the usual way, and costs. Mr. *Ince* asks for costs on the higher scale, and although I do not desire to encourage bringing these actions on bills of exchange in this branch of the Court, and so blocking it up, yet this is a case, I cannot help thinking, of no ordinary action on a bill of exchange, and has been tried a good deal more cheaply than with the ordinary apparatus of a Judge and jury and witnesses, and is a case in which, if it were an ordinary Chancery suit, costs would be given on the higher scale. I shall, therefore, certify for costs on the higher scale.

Solicitors: *Harper, Broad, & Battcock; Mercer & Mercer; Murray, Hutchins, & Co.*

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In re SIBLEY'S TRUSTS.

Will—Words "Children of F. or their issue"—Substitution.

Testator, after giving his residuary personal estate to all and every the children of his uncle *F.* or their issue in equal shares, gave his real estate to *A.* for life, and after her death upon trust for sale, and to hold the proceeds upon trust for "all and every the children of *F.* or their issue in equal shares *per capita*." Four of the six children of *F.* were dead at the date of the will, and two survived the tenant for life:—

Held, that the issue of the four deceased children of *F.* alive at the death of the testator or born during *A.*'s lifetime took as by substitution the shares of their deceased ancestors in the proceeds of the realty, the issue of each of the four taking, *inter se*, in equal shares.

Statement.

PETITION.

Robert Sibley, by his will, dated the 7th of May, 1867, gave to his trustees, *J. A. Dimmock* and *Ann Topping*, all his personal estate not thereinbefore specifically disposed of, upon trust to pay his debts, funeral and testamentary expenses, and legacies, and to pay the surplus to all and every the children of his uncle, *Robert*

Fuller, or their issue, in equal shares; and after giving certain other pecuniary legacies, the testator gave and devised all his freehold and copyhold land, hereditaments, and premises to his said trustees upon trust for the said *Ann Topping* during her life, and after her death to sell the same and hold the proceeds "upon trust for all and every the children of the said *Robert Fuller* or their issue in equal shares *per capita*."

The testator died on the 19th of March, 1870. *Ann Topping* died on the 13th of November, 1875, and *Dimmock*, the surviving trustee, paid into Court under the *Trustee Relief Act* the net proceeds of the sale of the real estate.

Robert Fuller died in 1832 leaving six children, of whom four, namely, *John Fuller*, *Ann Dennis*, *Hannah Cannell*, and *Elizabeth Wilkins*, were dead at the date of the testator's will, each of them leaving issue, and the remaining two, namely, *Martha Lawson*, the wife of *Daniel Lawson*, and *Mary Lawson*, widow, were now living.

Martha Lawson had seven children, one of whom, *Emma Holland*, had one child, *Mary Ann Holland*, born in October, 1870.

John Fuller had eight children, of whom seven were still living, and one, *Mary Hammence*, died in 1873, leaving five children.

Ann Dennis had five children, of whom three were still living, one, *John Dennis*, died in 1863 leaving four children, who were still living, and one, *Sarah Cooper*, died in 1865 leaving five children, all of whom were still living.

Hannah Cannell had four children, of whom three were still living, and one, *Mary Green*, died in July, 1870, intestate, and *John Green* took out administration to her estate.

Elizabeth Wilkins had eight children, of whom six were still living, one died in 1857 leaving children still surviving, and one died in 1857 without issue.

The present petition was presented by *Daniel Lawson* and *Martha* his wife and *Mary Lawson* for payment out of Court of the trust fund. *Daniel Lawson*, in right of his wife and *Mary Lawson*, claimed to be entitled to the trust fund in equal moieties on the ground that *Martha Lawson* and *Mary Lawson* were the only children of *Robert Fuller* who survived the testator.

Owing to the number of persons claiming an interest in the trust fund, it was arranged that the several classes who claimed

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interest in the fund as the issue of the deceased children of *Robert Fuller* should be respectively represented by the following persons, namely, *William Fuller*, son of the said *John Fuller; Alfred Hammence*, a son of the said *Mary Hammence; George Dennis*, one of the children of *John Dennis;* and the said *John Green.* These Respondents contended that the issue of the four deceased children of *Robert Fuller* were entitled to the shares of their deceased ancestors.

Argument.

Chitty, Q.C., and *Dundas Gardiner*, for the Petitioners:—

The Petitioners, as the only children of *Robert Fuller* who survived the testator, are entitled to the whole fund in equal moieties.

Under the gift after the death of *Ann Topping* in trust for "all and every the children of *Robert Fuller* or their issue," it being a gift to a class the issue cannot take except by substitution. Here the four deceased children cannot be objects of the gift, having died before the date of the will; therefore their issue are excluded: *Hawkins* on Wills (1).

There is a distinction between a gift to a class with an alternative gift and a similar gift to an individual. In *Salisbury* v. *Petty* (2), which was a case of a gift to individuals "or their issue," the children of deceased legatees took by substitution. So, under a gift to *A.* for life, and at her death to *B.* "or his heirs," *B.* having died in the lifetime of the testatrix, it was held that his widow and only child took by substitution: *In re Porter's Trust* (3).

In *Congreve* v. *Palmer* (4), under a bequest to *A.* for life, and afterwards amongst his sisters or their children living at her decease, it was held that the children could not take unless their parents could have taken, and that the children of a sister who was dead at the date of the will could not take.

Rigby, for *John Fuller*:—

This is not a case of pure substitution, but a case of an alternative gift to the issue, under which they are entitled to the shares

(1) Page 247.
(2) 3 Hare, 86,
(3) 4 K. & J. 188.
(4) 16 Beav. 435.

of their deceased ancestors who were dead at the date of the will: *Ive* v. *King* (1). The case of *In re Philps' Will* (2), though similar to *Congreve* v. *Palmer* (3), was an opposite decision. There, under a direction by a testator, after his wife's death, to divide a sum of stock among his children then living or their heirs, it was held by Lord *Romilly* that the heirs of the children who predeceased the wife, including some who were dead at the date of the will, were entitled to share with the children who survived her.

[He referred also to *Amson* v. *Harris* (4), *Finlason* v. *Tatlock* (5), *Bebb* v. *Beckwith* (6), *In re Potter's Trust* (7), and *Adams* v. *Adams* (8).

Fischer, Q.C., *Marten*, Q.C., *Oswald*, *Rodwell*, *Dryden*, *Woodhouse*, and *Eaden*, for the other Respondents.

JESSEL, M.R., referred to the case of *In re Smith's Trusts* (9).

Chitty, in reply.

(1) 16 Beav. 46.
(2) Law Rep. 7 Eq. 151.
(3) 16 Beav. 435.
(4) 19 Beav. 210.
(5) Law Rep. 9 Eq. 258.
(6) 2 Beav. 308.
(7) Law Rep. 8 Eq. 52.
(8) Ibid. 14 Eq. 246.
(9) M. R., June 5, 1875.

In re SMITH'S TRUSTS.

SARAH SMITH made her will, dated the 23rd of March, 1867, in the following terms:—"If *Sarah Smith* should have any money at her death, she wishes it to be equally divided amongst her brothers and sisters after all expenses are paid. Should any of her brothers or sisters be dead, their share is to be equally divided amongst their children. If no children be living, the money to be divided amongst the surviving brothers and sisters of *Sarah Smith*. I leave my sister *Hannah Arnold*, *née Smith*, my sole executrix to settle all my affairs."

The testatrix died on the 19th of January, 1875. The proceeds of her estate were paid into Court under the *Trustee Relief Act*, and the question on this petition was, whether the children of a brother of the testatrix, who was dead at the date of the will, were entitled to a share of the fund.

Chitty, Q.C., and *S. Dickinson*, for the Petitioners, contended that these children were not entitled to share. The will contained an original gift to the brothers and sisters of *Sarah Smith*, followed by a substitutionary gift in case of any member of the original class not being alive at her death; but a brother dead at the date of the will was not a member of the original class, and consequently his children could not take under the substitutionary gift: *Christopherson* v. *Naylor* (1 Mer. 320); *In re Hotchkiss's Trusts* (Law Rep. 8 Eq. 643); *In re Potter's Trust* (Law Rep. 8 Eq. 52); *Hunter* v. *Cheshire* (Law Rep. 8 Ch. 751); *Gray* v. *Garman* (2 Hare, 268).

Davey, Q.C., *F. A. Lewin*, and

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JESSEL, M.R.:—

I have to construe to-day, as I have to construe very often, an obscure will, and I have to find out what the meaning of it is, and, although it is very probable the testator himself had no particular meaning, still that is no reason why the Court should not find a particular meaning. I have found out what I think is his meaning, but at the same time I repeat an observation which I have very frequently made before—I am by no means sure that other people as learned and experienced as myself, or more so, would concur with me in the meaning I am going to attribute to these words, and I am not disposed to find fault with anybody who differs from me. But I have a strong opinion that the meaning I am going to attribute to the testator is not a meaning which he himself would disapprove of; beyond that I cannot say anything about his intention.

As I understand the authorities upon wills relating to personal estates, the modern authorities all shew that you are not to strain arbitrary rules of construction: there are some rules fixed in the law which must be abided by, but you are not to make new ones. It is further settled that, in the absence of definite arbitrary rules which bind every Court in matters of construction, the true guide is the meaning of the words, which are to be read literally, subject only to this, that there may be something in the nature of original gift or in the context of the instrument which will control the words.

Boome, for the Respondents, were not called upon.

JESSEL, M.R.:—

The question is, whether I am to attribute to this testatrix the capricious intention that, if a brother died before her will, his children should not take, but that, if a brother died after her will, his children should take. I am of opinion that I am not bound to do anything of the sort. She gives her money to be equally divided amongst her brothers and sisters, and then she says, "should any of her brothers and sisters be dead, their share is to be equally divided amongst their children." The words "their share" cannot mean a share given to a brother or sister who is dead, because you cannot give a legacy to a dead person, as the testatrix must have known; and consequently "their share" must mean "the share which they would if living have taken." Therefore I hold that the children of the brother who was dead at the date of the will are entitled to a share.

Solicitors: *Tatham, Procter, & Co.*; *E. Bromley*; *Lewin & Co.*; *Feuillade.*

First, therefore, one has to see whether the authorities which have been cited, and those referred to in the text books of Mr. *Jarman*, Mr. *Hawkins*, and Mr. *Theobald*—whether that immense mass of authorities decides anything which would have a bearing upon this will. Without saying that they do not, I think I may say they do not help me very much.

This I think is settled, that when a legatee takes by substitution, he or she must be a substitute. When you have a person who claims by substitution, you must shew that the person in whose place he stands, himself could take, which really is only stating the same proposition (which is a truism) in different words. But there are authorities which shew that when you find a gift in a will to *A.* or *B.*, that word "or" is to have some meaning, and it is to have a meaning which depends upon what *A.* or *B.* really consists of. You cannot lay down *à priori* that the gift to *A.* or *B.* has any particular meaning; you must first of all know what *A.* and *B.* are.

To illustrate what I mean, you sometimes find that when you are told what *A.* and *B.* are, you arrive immediately at what the meaning is. Suppose a man says, for example, "I give £1000 to the Bishop of *Rochester* or his successor," there cannot be a doubt then that he means the present Bishop of *Rochester* to take if he is alive, and if he dies, then the bishop who occupies the see to take it. There the description of the legatee shews what you mean. So you may have a gift "to *John Jones* or his next of kin." I take it there that, in order for a person to take under the alternative, *John Jones* must be dead.

In those cases it is very plain; but you presently come to a class of cases in which it is not so plain. For instance, a testator gives a bequest "to *John Jones* or his children." Now, standing alone, it is not so plain as the case I have put, that the children are to take in the place of *John Jones*, who is dead; but there the authorities do help me as to the meaning of the word "or," and shew that the children are only to take if *John Jones* is dead. To that extent I think the authorities are plain.

But then you get to another class of gifts, in which, instead of having *John Jones* in place of *A.*, you have a class for the *A.* and a class for the *B.* The first class, for instance, may be "the children

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of my nephew," or "my nephews and nieces," or "my great-nephews and nieces"—followed by "or their children." Then what are you to do with the gift? The authorities shew that the children who are to take under the "or," which implies in all cases an alternative gift—assuming there is no context (which there may be) to make the "or" conjunctive—are the children of the class to whom the previous gift is made. But that does not throw much light on the question what the first class is, and it is upon that that the contest has chiefly turned. For instance, whether it includes people dead at the date of the will, people who die in the lifetime of the testator, or anybody who could not take at the death of the testator. Upon that point, as far as I can see, the authorities throw no light whatever, so that must depend upon the terms of the will itself. A man may, no doubt, speak of his dead nephews and nieces as "my nephews and nieces," but if he says, "I give to the children of my nephew *John* £100 each," and you can shew that he knew his nephew *John* was dead, then it is quite plain that he speaks of a man as his nephew whom he knows to be dead. Or it may appear from another part of the will that he knew him to be dead, and if he then speaks of him as a nephew, although he knows him to be dead, he need not say "my late nephew" or "my deceased nephew." So that in every case, to find out what was the class originally intended, you must depend upon the will itself. I admit that if once you have found out what that class was, those who take under the alternative can only take in substitution, that is, in the place of members of that class, and must shew a title derived from that class. Where there is a gift to a class or their children, there you must shew that the child who claims is a child of one of the first class: you must shew him to be in the *A.* before he can be in the *B.*

The point I really have to determine here is, who form the first class? There is no reasonable doubt as to the second. It is the issue of the first; and the issue of the first, according to the decisions, only take in case of the death of the first. Therefore, I have to find who are comprised in the gift which I have here, for "all and every the children of the said *Robert Fuller*." The state of the family, as known to the testator, was this: His uncle had died in 1832, a great number of years before the

will was made, in 1867. He had had six children, two of whom were living, *Martha* and *Mary*, and four were dead, and the four who were dead had been tolerably prolific and left a great number of descendants. That was the state of the family of his uncle. Some of them had died many years before, all had died some years before the date of the will. Knowing the state of the family (I will assume it for the present purpose as no inquiry is asked for upon it), he first of all gives the residue of his personal estate in this way, "to all and every the children of my uncle *Robert Fuller*, or their issue, in equal shares," then he gives his freeholds and copyholds upon trust for *Ann Topping* for her life, and after her death he directs his trustees to sell the same, and to hold the moneys arising from such sale, after payment of the costs attending such sale, in "trust for all and every the children of the said *Robert Fuller*, or their issue, in equal shares *per capita*." The distinction between the two gifts is, first of all, in adding "*per capita*;" and, secondly, in the fact of there being a prior estate for life as regards freeholds and copyholds, and no prior estate for life as regards the personal estate.

Looking at the relationship of the testator, and looking at the fact that he describes them as the children of his uncle, that is, as his first cousins, one may assume that the motive of the gift was the relationship, and it would be a very singular thing if he intended to exclude from one class persons to whom he had given shares under the other class. It seems to me, therefore, perfectly reasonable to say in effect: "as I have given an immediate gift of my personal estate, I intend everybody living at the period of the distribution, or who may be entitled at the period of the distribution, to take," and to say the same thing as regards the real estate; the only effect would be that the latter class would include persons subsequently coming into being, but in other respects we should expect to find the classes identical. In the next place, it does not appear to me that an ordinary man, knowing that he had but two surviving cousins, the two children of his deceased uncles, would describe them as "all and every the children." To my mind that does convey an idea of more than two, and I think it would to the minds of most persons conversant with the ordinary uses of the English language, and it does weigh with me very

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much, seeing the expression used, and seeing the state of the family, that he did use twice over the words "all and every the children."

In the next place, we must look at the fact that they are collateral relatives, and, as I said before, the motive is explained by that collateral relationship. It is not, therefore, to be expected that he would particularly favour the issue of those two children of his uncle who happened to be living at the time at the expense of the issue of those four children of his uncle who were dead at the date of the will. It is not likely, when you see the description of the legatees and consider the motive, which I think the Court must assume to be the true motive, of the legacy. That, I think, again aids one in construing the will.

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It being then settled, as I said before, no further than that the "or" is substitutionary for something, it does appear to me that, considering the state of the family, and the words used, there is nothing in the authorities to prevent my construing them literally, and reading "all and every the children" as meaning, not all the children he had then living, but all his children in the literal sense; and, consequently, I come to the conclusion that the issue of a child dead at the date of the will would take in the place of his parent, because that was really what the testator intended by his description of the first class; in other words, he meant not only "all the children now living," but "all the children my late uncle had," and, consequently, that he meant the issue to take.

The next question is, how do they take? Again, applying substitution, they are to take in place of their dead parents or ancestors. Must not it follow, as they are to take in their place, that they are to take their shares? It seems to me that is the natural conclusion to which you come when you explain the words fully. As to those that are dead, their issue are to stand in their place but as between themselves they are to take in equal shares.

MINUTES:—Declare that, upon the true construction of the will of *Robert Sibley*, the testator, the sum of £2431 cash in Court is divisible into six equal parts, and that the Petitioners *Mary Lawson* and *Daniel Lawson*, in right of his wife the Petitioner, *Martha Lawson*, are respectively entitled to one of such parts, and that the respective issue of the four following persons, namely, *John*

Fuller, *Ann Dennis*, *Hannah Cannell*, and *Elizabeth Wilkins*, the deceased children of *Robert Fuller* alive at the death of the testator, or born during the lifetime of *Ann Topping*, the tenant for life, were and are respectively entitled to one other sixth part, the issue of each of such four persons taking among themselves as tenants in common.

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Solicitors: *Cole & Jackson*, agents for *E. Wayman, Cambridge.*

In re JOHNSON'S PATENT.

M. R. 1877 *March* 3.

Specification—Clerical Error—Amendment—Jurisdiction of Master of the Rolls—Judicature Act, 1873, *s.* 17, *sub-s.* 6.

The Master of the Rolls has jurisdiction, as Keeper of the Records, to direct the amendment of a clerical error in a specification filed in the Patent Office, such jurisdiction being saved by the *Judicature Act*, 1873, s. 17, sub-s. 6.

Where any such amendment has been directed, notice of the order should be given to the Commissioners of Patents, so that the specification may be reprinted.

Statement.

THIS was a petition by a patentee, intituled in "The High Court of Justice, Chancery Division," and presented to the "Master of the Rolls," praying his Lordship to direct that an engrossed specification, which had been filed in the Patent Office on the 12th of September, 1876, and afterwards printed, should be amended by the insertion therein of certain words which had been inadvertently omitted by the copying clerk in making the engrossment from the original draft.

The application was made with the consent of the Attorney-General.

The fact of the mistake was duly proved by affidavit, and the only question was one of jurisdiction.

Argument.

Aston, Q.C., for the Petitioner:—

The Master of the Rolls, as Keeper of the Records, has always had jurisdiction to amend clerical errors of this kind: *In re Sharp's Patent* (1); and cases cited in notes (2); *In re Nickels' Patent* (3). The record jurisdiction of the Master of the Rolls is

(1) 1 Webs. P. R. 641, 646, 647. (2) 1 Webs. P. R. 649.
(3) 1 Webs. P. R. 650.

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expressly saved by sect. 17, sub-sect. 6, of the *Judicature Act*, 1873. Or your Lordship possibly has jurisdiction as a Commissioner of Patents.

Judgment.

JESSEL, M.R. :—

It is quite clear that I still have jurisdiction, as Keeper of the Records, to make an amendment of this kind where I am satisfied that there has been a mistake *per incuriam*, and I therefore make the order as prayed. Notice of the order must be given to the Commissioners of Patents, so that the specification may be re-printed.

Solicitor: *J. H. Johnson.*

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In re BELLIS'S TRUSTS.

Will—General Devise—Charge of Debts and Legacies—Trust Estates.

A testator gave various pecuniary legacies, and all the rest and residue of his estate, real and personal, he gave, devised, and bequeathed to his wife, her heirs, executors, administrators, and assigns, absolutely :—

Held, that the legacies were charged on the real estate, and therefore that the general devise did not pass property of which the testator was seised in fee as trustee.

Trust estates will not pass under a general devise where there is a charge of debts, or of legacies, or of debts and legacies.

In re Brown and Sibly's Contract (1) dissented from.

Statement.

BY an indenture of settlement, dated the 3rd of July, 1871, certain real estate was conveyed to *Thomas Helps* in fee simple, upon trust for sale and application of the proceeds as therein mentioned.

By his will, dated the 1st of August, 1860, *Thomas Helps* gave various pecuniary legacies, "And all the rest and residue of my estate, real and personal, I give, devise, and bequeath to my wife, her heirs, executors, administrators, and assigns, absolutely."

The will contained no express devise of trust estates.

The testator died on the 5th of June, 1873, leaving his widow

(1) 3 Ch. D. 156.

and his only son and heir-at-law—who was an infant—him surviving, and administration with the will annexed was shortly afterwards granted to the widow.

Statement.

In October, 1873, new trustees of the indenture of settlement were appointed by the testator's widow, under a power therein contained, the trust property being conveyed by her to the new trustees.

The new trustees having made several sales of property comprised in the settlement, some purchasers took the objection that the legal estate did not pass by *Thomas Helps'* will, but was outstanding in his heir-at-law, and accordingly this petition was presented by the new trustees for an order vesting in them the legal estate in the whole of the settled property. The infant heir was not made a Respondent.

Argument.

Chitty, Q.C., and *Leeson*, for the Petitioners:—

It appears doubtful upon the authorities whether the legal estate in this trust property passes or not.

In the first place, the rule is that where legacies are followed by a general devise of real estate the legacies are charged on the real estate: *Greville* v. *Browne* (1); and your Lordship recognised that rule in *In re Brooke* (2). In the recent case of *In re Packman and Moss* (3) your Lordship held that a general devise of real estate charged with debts and funeral expenses—and we submit the same rule applies as to legacies—does not pass the legal estate in mortgaged property.

In *Martin* v. *Laverton* (4) Vice-Chancellor *Malins* held that a mortgaged estate did not pass under a general devise, but there the gift was to tenants in common, one moiety being settled.

Again, in *In re Smith's Estate* (5), your Lordship held that a mortgaged estate did not pass under a general residuary devise, but there also the residue was settled.

Where there is a general devise subject to a charge of debts and legacies, it might, no doubt, be convenient to sever the gift and hold that the debts and legacies are charged exclusively on

(1) 7 H. L. C. 689.
(2) 3 Ch. D. 630, 632.
(3) 1 Ch. D. 214.
(4) Law Rep. 9 Ch. 563.
(5) 4 Ch. D. 70.

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the property which was the testator's own, as in *In re Teape's Trusts* (1), where a testator, having a limited power of appointment, made a general devise and bequest, preceded by a direction for payment of his debts and funeral expenses; and the gift was read as a charge of the debts and funeral expenses upon the testator's own property. It seems, however, clear from the older authorities, that where there is a charge of debts and legacies, a general devise will not pass trust estates: *Roe* v. *Reade* (2); *Duke of Leeds* v. *Munday* (3); *Hope* v. *Liddell* (4); *Theobald* on Wills (5).

The difficulty in the present case arises from the recent decision in *In re Brown and Sibly's Contract* (6), where Vice-Chancellor *Malins*, following what Vice-Chancellor *Giffard* considered, in *In re Stevens' Will* (7), to be the rule of convenience, and dissenting from your Lordship's view in *In re Packman and Moss* (8), held that trust estates passed under a general devise notwithstanding a charge of legacies.

[They also mentioned *Lysaght* v. *Edwards* (9).]

Judgment.

JESSEL, M.R.:—

This is a question of title to real estate; and I must say it appears to me that the case is concluded by authority upon this very point.

First, what is the meaning of the will itself? Now, on that point I will read what Lord *Eldon* said in *Lord Braybroke* v. *Inskip* (10): "In each case you must look at every part of the will for the intention with regard to such property. . . . I know no case, which states as the rule, that trust estates shall not pass under general words, unless an intention, that they should pass, appears; and I incline to think, they will pass, unless I can collect from expressions in the will or purposes or objects of the testator, that he did not mean they should pass."

Lord Braybroke v. *Inskip* is still law, and that is the rule; you

(1) Law Rep. 16 Eq. 442.
(2) 8 T. R. 118.
(3) 3 Ves. 348.
(4) 21 Beav. 183. 2 Jur. N.S. 105
(5) Pages 75, 76.
(6) 3 Ch. D. 156.
(7) Law Rep. 6 Eq. 597.
(8) 1 Ch. D. 214.
(9) 2 Ch. D. 499.
(10) 8 Ves. 417, 435.

must find something in the will shewing the testator's intention that his trust estates should not pass under general words.

We must, then, first look at the will. The testator gives various pecuniary legacies, "and all the rest and residue of his estate, real and personal," he devises and bequeaths to his wife absolutely.

Now it has been decided by *Greville* v. *Browne* (1), and a host of other authorities, that by such a will the testator intends to charge his real estate so given to his wife with the legacies. What he means to give is, "the residue of my real estate which shall remain after payment of the legacies."

It is, therefore, the same thing as if he had said, "I give my real estate charged with payment of the before-mentioned legacies."

Then the question is, whether, if a man gives his real estate charged with legacies, the gift will pass real estate of which he is trustee?

I will first of all consider the case upon the authorities, and the first I will refer to is *In re Brown and Sibly's Contract* (2). Now, I cannot conceal from myself that the Vice-Chancellor *Malins* in that case decided the exact contrary to what I am going to decide. There the testator, after giving numerous legacies, gave "the rest and residue" of his property to his great-nephew. The learned Vice-Chancellor was right in his view that it was the same as if the testator had said, "I give all my real estate charged with the legacies;" but then he goes on to observe, "If another man says, 'I give all my real estate, charged with the payment of debts and legacies,' what impropriety is there in saying that the trust estates will pass? The rational and convenient course is to say that trust estates pass, but that the charge affects those estates only which belong to the testator beneficially."

Now I am not going to give any opinion as to what is rational and what is not; I will merely say that that is a decision in the year 1876, and that the rule has been settled by a long string of authorities which neither the learned Vice-Chancellor nor I can overrule however irrational they may be: so I will not say whether they are or are not irrational.

The point that a direction to pay debts followed by a general

(1) 7 H. L. C. 689. (2) 3 Ch. D. 156.

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devise of real estate creates a charge of the debts upon the real estate has been decided; it has also been decided that a bequest of legacies followed by such a devise has the same effect. It is therefore quite clear upon principle that whenever you find a direction to pay debts and legacies, or debts alone, or legacies alone, followed by a general devise of real estate, that is sufficient to charge the real estate: there are decisions on all three points. That is settled law which the Court is bound to follow.

I wish it to be distinctly understood that I am not deciding whether or not it is right, rational, or convenient that under such circumstances where a testator has trust estates you should split the gift, so to speak, and say that the charge only affects those estates which belong to the testator beneficially: all I say is that it is now too late to give any opinion upon that, and I will refer to authority to shew that it has already been decided that you cannot so split the gift.

The first case to which I will refer is *Roe* v. *Reade* (1), decided in 1799. There a testator devised all his real estate to his son, after payment of his debts, legacies, and funeral expenses, and the question was whether a trust estate passed under the devise: it was held that it did not, by reason of the direction as to payment of his debts, legacies, and funeral expenses. What Lord *Kenyon* said was this (2), "The trustee (the devisor) had no beneficial interest in himself; he was a mere naked trustee, though the use was executed in him; and when he set about to make a disposition of his property by his will, he used general words in the residuary clause, giving all his estates 'after payment of his debts, legacies, and funeral expenses.' Now these latter govern and restrain the general effect of the former words, and shew that he only meant to give that in which he had a beneficial interest, and which he had a power of charging with the payment of his own debts. But it is clear that he could not subject the estate in question to his own debts; this satisfies me that he had no idea of disposing of the trust estate; and therefore I think, on the authority of *Strong* v. *Teatt* (3), that the estate in question did not pass by the residuary clause in this will." That reasoning is quite as applicable to legacies as to debts.

(1) 8 T. R. 118. (2) 8 T. R. 122. (3) 2 Burr. 912.

Now the next case to which it is desirable to refer is *Re Horsfall* (1), decided in 1825. That was a case of a mortgaged estate, but the reasoning is the same. There a testator, after directing the payment of his debts, funeral and testamentary expenses, and making certain devises of real estate, gave to trustees "all the rest, residue, and remainder of and in all and singular the property, estate, and effects, which he should be possessed of, or entitled to, or over which he should have a disposing power, at the time of his decease, of what nature or kind soever the same might be;" and the question was whether the legal estate in certain mortgaged premises passed under the general devise. Chief Baron *Alexander* held that it was clear, according to all the authorities, that the legal estate in the mortgaged premises did not pass by the general devise.

The next case on the subject is *Doe* v. *Lightfoot* (2), decided in 1841. It is an authority which, upon the judgment, is exactly in point, though the will itself is not precisely in point; but, as I have often said, in order to see whether an authority is in point you should look at the judgment and the Judge's statement of the facts. There the gift was, according to the statement in the report, of all the testator's real and personal estates, "after payment of his just debts and funeral expenses," to certain persons as tenants in common in fee. The question was whether a mortgaged estate passed, and it was held that it did not. Lord *Abinger* said (3), "This is not the case of a general devise of all the testator's real estates, without any words of restriction, but a devise of all his real estates after payment of his debts and legacies, *i.e.*, after payment of them by the devisee out of the estates devised. The cases which have been referred to shew that such a devise is not sufficient to pass estates of which the testator is seised only as a trustee, since he cannot have intended to subject them to the payment of his debts and legacies; and a mortgagee is only, as to the land, a trustee for the mortgagor." Baron *Parke* said (4), "I am of the same opinion. This is altogether a question as to the intention of the testator; and by a devise of all his real and personal estates, 'after payment of all his just

(1) M'Cl. & Y. 292.
(2) 8 M. & W. 553.
(3) 8 M. & W. 558.
(4) Ibid. 559.

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debts and legacies,' he could not have intended that estates should pass of which he was seised merely as mortgagee, but only estates which he had power to subject to the payment of his debts and legacies, that is to say, those which were equitably as well as legally *his own*. The property in question, therefore, did not pass by this will." Barons *Alderson* and *Rolfe* concurred.

That case is, therefore, a strong authority where the direction is to pay debts and legacies.

The next case is *Hope* v. *Liddell* (1), decided in 1855. There the testator, *William Thompson*, devised all his real estates to his sister charged with a single legacy, and one of the questions in the suit was whether the devise passed a trust estate which was vested in the testator. There was an elaborate argument upon the other questions in the case, and the Master of the Rolls says (2), "The first question raised is, whether the legal estate in Dr. *Spencer's* hereditaments passed by this will, or whether it descended on his heir-at-law? This was not very strenuously contested, and, in my opinion, little doubt can be entertained, but that the will of *William Thompson* did not dispose of this trust estate, and that the legal estate in Dr. *Spencer's* devised estates descended on *Jonas Thompson*, the heir-at-law of the trustee." That, therefore, is a distinct decision that the fact of the real estate being subject even to a single legacy is sufficient to prevent the trust estate from passing.

It seems to me, therefore, to have been decided long before the year 1876 that where there is a charge of debts, or of debts and legacies, or of legacies only, a bare trust estate will not pass under a general devise of real estate.

I therefore decide that this trust estate did not pass under the will, and I accordingly make a vesting order.

Solicitors: *Meredith, Roberts, & Mills*, agents for *Helps, Birch, & Co., Chester*.

(1) 21 Beav. 183. 2 Jur N S 105. (2) 21 Beav. 200. 2 Jur N S 106

BROWNING *v.* SABIN.

M. R.

1877

April 26.

[1875 B. 298.]

Practice—Notice of Motion for Attachment—Service on Solicitor—Rules of Court, 1875, *Order* XLIV., *r.* 2 (a)

Where a notice of motion is given for a writ of attachment to issue against a Defendant under Rules of Court, 1875, Order XLIV., rule 2, service of such notice on the solicitors on the record of the Defendant is sufficient service.

Statement.

THIS was a motion to discharge an order for a writ of attachment on the ground of insufficient service.

The Plaintiff, who had a life interest in certain trust funds of which the Defendant was trustee, had obtained an order for the payment of the funds into Court. This order was personally served upon the Defendant, who refused to comply with it.

The Plaintiff then moved, under Rules of Court, 1875, Order XLIV., rule 2, for a writ of attachment to issue against the Defendant, and notice of the application was served upon the solicitors upon the record of the Defendant, and the Defendant not appearing, on the 23rd of May, 1876, the writ of attachment was ordered to issue, and the Defendant was attached.

Argument.

Chitty, Q.C., and *Herbert Smith*, now moved that the order for the writ of attachment might be discharged, on the ground that the notice of motion ought to have been served on the Defendant personally.

W. S. Owen, for the Plaintiff, was not called on.

Judgment.

JESSEL, M.R., held that service of notice of motion for a writ of attachment upon the solicitors on the record of the Defendant was sufficient, and dismissed the motion with costs.

Solicitors for Defendant: *Rickards & Walker.*

Solicitor for Plaintiff: *R. Metcalfe.*

(a) See 11 A (1875) 0 W. N. 360

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1877

May 4.

BORDIER *v.* BURRELL.

[1876 B. 455.]

Practice—Trial of Issues of Fact by Jury—Rules of Court, 1875, *Order* XXXVI., *rr.* 3, 26. (a)

In an action for a mandatory injunction to restrain the Defendant from permitting a building to remain so as to obstruct the Plaintiffs' ancient lights, the Defendant having given notice under Rules of Court, 1875, Order XXXVI., rule 3, for the trial of issues of fact by jury, on a motion by the Plaintiffs that the action might be tried by a Judge without a jury :—

Held, that the case did not come within rule 26 of Order XXXVI.; and that the Defendant was entitled to have the action tried according to his notice.

The class of cases to which Order XXXVI., rule 26, is intended to apply, considered.

Statement.

THIS action was brought to restrain the Defendant from permitting the wall or roof of a new building to remain at or from raising the same to a greater height than that of the house formerly standing on the site of the present building; and from in any way obstructing the access of light and air to the Plaintiffs' ancient lights; and that the amount of damages might be ascertained and paid by the Defendant to the Plaintiffs.

The statement of claim and statement of defence had been respectively delivered by the parties, and issue joined.

The Plaintiffs had given notice of trial with witnesses, and the Defendant had given notice to the Plaintiffs for the trial of the issues of fact before a Judge and a special jury.

The Plaintiffs now moved that the action might be tried before a Judge ~~and a special~~ jury.

Argument.

Chitty, Q.C., and *Simmonds*, in support of the motion :—

The Plaintiffs are desirous that the action should be tried before a Judge, and, as a mandatory injunction is asked for, the case is one peculiarly fitted to be tried before a Judge without a jury. Before the *Judicature Act* was passed there was complete jurisdiction in the old Court of Chancery under *Sir John Rolt's Act* (25 & 26 Vict. c. 42) to deal with such a case, and, although

(a) See now W.N. (1876) Pt. II. 356, 357.

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under the 3rd rule of Order XXXVI. of the Rules of Court, 1875, the Defendant is said to be entitled to have the case tried before a Judge and jury on giving notice to the Plaintiffs, yet that is controlled by the 26th rule of the same Order, which provides that "the Court or Judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the Act could without any consent of parties be tried without a jury."

Here, we submit that it is desirable that the whole case should be heard before your Lordship instead of first going before a jury and then, as would probably be the case, coming back on the question of the injunction.

Fischer, Q.C., and *W. Hemings*, for the Defendant, were not called on.

Judgment.

JESSEL, M.R.:—

This is an action to obtain an injunction to prevent the Defendant obstructing the ancient lights of the Plaintiffs' messuage. The obstruction is an actually existing obstruction, a building standing. It does not depend, therefore, upon any theory; it is a mere question of fact whether the alleged obstruction does interfere materially with the Plaintiffs' light. I have no doubt that that question of fact can be decided by a jury. Indeed, as long as the common law has existed, such questions have been decided by a jury, with the exception of the short period between the passing of *Sir John Rolt's Act* and the passing of the *Judicature Act*, when such questions were decided in Chancery suits by a Chancery Judge. Therefore, this being a matter which can properly be decided by a jury, it appears to me that the Rules of the *Judicature Act* require me to send it to a jury if either party so demands.

The 3rd rule of Order XXXVI. is in express terms: "The Defendant may, upon giving notice within four days from the time of the service of the notice of trial, or within such extended time as a Court or Judge may allow, to the effect that he desires to

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Judgment.

have the issues of fact tried before a Judge and jury, be entitled to have the same so tried." The 26th rule of the same Order is this: "The Court or a Judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the Act could, without any consent of parties be tried without a jury." Now, this undoubtedly is such a case, because, under the provisions of *Sir John Rolt's Act*, it could have been tried in the Court of Chancery by a Judge without any consent of the parties. It is therefore within the words of the Order, but not within the spirit of the Order. The rule was intended to apply to that class of actions which a jury is not as a rule competent to deal with, either from their great complexity as regards facts, or from fact and law being so intermingled together that it would be difficult, if not impossible, to direct a jury by separating the law from the fact, or because the questions as regards the law are of such a delicate nature and require a knowledge of such refined law that they could not conveniently be presented to a jury. In all these cases the Judge would say, "These are not cases which I should be justified in sending to a jury." But when it is a simple case of this kind, I am of opinion that the Judge would be repealing the Act if he declined to send it to a jury.

I am glad to find that this is the view which has been taken by two of the Vice-Chancellors. In *West* v. *White* (1) Vice-Chancellor *Bacon* says: "I am called upon to exercise that discretion now" (that is, the discretion under rule 26). "I am asked on one side to give effect to the statutory title," that is, to a jury, "and on the other to exercise a discretion, which I cannot do, unless I decide that there are reasons which entitle me to deprive the Defendant of that statutory right which he has."

Vice-Chancellor *Hall* had a similar point before him in *Clarke* v. *Cookson* (2), where, after quoting the 3rd rule, he said: "This rule was framed expressly to meet cases which would under the old system have been tried in the Chancery Division, and which might be considered, by reason of involving a mixture of law and

(1) 4 Ch. D. 631, 634. (2) 2 Ch. D. 746.

fact, or from great complexity, or otherwise, not capable of being conveniently tried before a jury."—He knew the history of the rule of course, for he was one of the committee of Judges who settled the rules.—" Where the case is of a nature fit to be tried by a jury, the right of the Plaintiff or Defendant should ordinarily not be interfered with."

That being so, I must refuse the application.

Solicitors: *Sidney Chapman; E. Burrell*, Defendant in person.

V.-C. M.
1877
April 18.

WIDGERY *v.* TEPPER.

[1874 W. 90.]

Wife's Chose in Action—Sale by Husband—Reduction into Possession—Right to set aside Sale.

A. being entitled in right of his wife to a share of an intestate's estate, sold the share to *B.*, a solicitor, who conducted a suit to administer the estate. *A.* predeceased his wife, and *B.* died subsequently. A suit was instituted by the executors of *A.* to set aside the sale, on the ground that information in the possession of *B.* as to the real value of the property was concealed from *A.* at the time of the sale :—

Held, upon a preliminary objection, that the sale by *A.* of his wife's *chose in action* was a reduction into possession, which was voidable under certain circumstances, and the right of avoidance being in the husband survived to his executors, and they were the persons entitled to sue, and not the wife's representatives.

Statement.

JOSEPH M. W. TURNER, R.A., died in 1851, having made a will, giving a portion of his property to persons therein named, and bequeathed some of his pictures to the *National Gallery* for exhibition to the public, but having died intestate as to other property, including his engravings, pictures, drawings, and sketches. This suit was instituted for the administration of the estate of the deceased, and by an order in that suit made by Vice-Chancellor *Kindersley* on the 19th of March, 1856, it was declared that the engravings now in question, and also such of the pictures, drawings, and sketches as should not have been selected by the persons appointed to select the same on behalf of the *National Gallery*, belonged to the Defendants, as part of the testator's estate, in the proportions following, that was to say, as to one fifth part to the Defendant *Thomas Price Turner;* as to one other fifth part thereof, to the Defendant *Mary Matthews;* as to one other fifth part thereof, to the Defendant *John Widgery*, and *Mary Ann Turner* his wife, in her right; and so on as to the remaining fifth parts. And it was ordered that such engravings, pictures, drawings, and sketches, should be delivered up by the trustees of the *National Gallery* to *Jabez Tepper* on behalf of the Defendants *Thomas P. Turner, Mary Matthews, John Widgery*, and *Mary Ann Turner* his wife, and the other persons therein named.

In January, 1858, *Jabez Tepper*, a solicitor, who was the son of one of the next of kin, and who represented them all in the administration suit, called the parties together, and offered to give each of them £500 for his share in the property of the deceased *Joseph Turner*. One of the next of kin, Mr. *Coham Turner*, declined to accept the offer, but the others, including *J. Widgery* and his wife, accepted the offer and received the £500 for their share in the engravings, pictures, drawings, and sketches.

Statement.

J. Widgery died in the year 1861, and his wife died in 1871, and *Jabez Tepper* died in 1872. This suit was instituted by the executors of *J. Widgery* against the representatives of *Jabez Tepper*, praying that the sale of the engravings, &c., might be set aside on the ground that *Jabez Tepper* at the time of the sale well knew that they were of much greater value than the sum so paid to the next of kin, and that he had in his possession a valuation of the property made for the purpose of the probate duty by Mr. *Gambart*, which amounted to £5000; and, further, that if he did not know the value it was his duty as the confidential solicitor of the parties to have ascertained the value of the property, and to have informed his clients the next of kin thereof.

Another suit, intituled *Turner* v. *Tepper*, was instituted at the same time with this suit of *Widgery* v. *Tepper* by another of the next of kin for a similar purpose. That suit came on for hearing at the same time with this, but was ordered to stand over for further evidence.

A preliminary objection was now raised that the share of this property, which was a *chose in action* belonging to the wife of *J. Widgery*, was never reduced into possession by her husband, and that, she having survived him, the property belonged to her, and that the suit for setting aside the sale to *Jabez Tepper* should have been instituted by the representatives of the wife, and not by the executors of the husband.

Argument.

J. Pearson, Q.C., and *W. Karslake*, for the Plaintiffs, the executors of *J. Widgery*:—

The objection to our title is that these articles were not reduced into possession by *J. Widgery* during his life, and that as he predeceased his wife his executors are not entitled to sue, but the

V.-C. M. 1877 WIDGERY v. TEPPER. Argument.

wife's representatives are the persons in whom the right is vested. We say that in fact, law, and equity, the property was the property of *J. Widgery*, and belonged to his executors, and his wife had no interest in it except so far as she might take under her husband's will.

In the first instance, we need only go to the decree made by this Court in 1856, by which the fifth share in the engravings, pictures, drawings, and sketches was ordered to be paid to *J. Widgery* and his wife in her right, that was sufficient to give the husband an absolute right to the property. The principle was laid down in *Forbes* v. *Phipps* (1); there a *feme covert* was entitled to one-sixth of the residue of a testator's estate; upon a bill filed by another residuary legatee to which she and her husband were Defendants, a decree was made for a sale of the estate, and payment of one-sixth to the husband and wife, and it was held that the wife's share vested absolutely in her husband by the decree. *Hore* v. *Becher* (2) is also an authority in support of our argument. Reduction into possession after the decree was unnecessary, but if it was necessary, then the sale by *J. Widgery* was an absolute sale to *Jabez Tepper*, which, under certain circumstances, might be set aside. It was voidable by reason of the conduct of *Tepper*. *J. Widgery* might, during his life, have brought a suit to set it aside, and that right is now vested in his executors.

Bristowe, Q.C., and *T. A. Roberts*, for the representatives of Mrs. *Widgery*:—

Either the alleged sale to *Tepper* by *Widgery* and his wife was a sale or it was not. The nature of the claim is that it was not a sale. It is called an alleged sale, and it is asserted that the alleged sale by *Widgery* in right of his wife was not a sale, and if not a sale, then there was no reduction into possession by *Widgery* on the ground of its being a sale. The whole case made by the Plaintiffs is that it was no sale. It might amount to an intention to reduce into possession, but that is not sufficient to satisfy the law: *Roper's* Husband and Wife (3); and consequently the wife surviving the husband would be entitled to the property,

(1) 1 Eden, 502. (2) 12 Sim. 465.
(3) Vol. i. p. 204.

as she is entitled to every *chose in action* not reduced into possession. You must have corporeal possession of the thing itself, and here there was none. There was only an intention to make a sale, which the Plaintiffs allege was never carried into effect. Even where a husband recovers a judgment for his wife's debt, and dies before execution, the wife is entitled, and not the husband's executors: *Bond* v. *Simmons* (1); and if the husband hands over property to another person for the benefit of the wife, that does not reduce it into possession: *Daniell's* Ch. Prac. (2). Where a sale is set aside, the parties are put in the same position as before the sale was made.

Glasse, Q.C., and *C. H. Turner*, for the representatives of *Jabez Tepper*:—

It may be assumed that the sale was a voidable transaction, but still the right of avoidance was in the wife. Even an absolute assignment by the husband would not have been good against the wife, because by the decree the engravings were ordered to be delivered to *Jabez Tepper* on behalf of himself and the other parties, and the share of Mrs. *Widgery* was to belong to *J. Widgery* and his wife in her right. They never were handed over to them, but the husband sold his right: *Hutchings* v. *Smith* (3).

If it was a voidable contract, the right of avoidance survived to the wife. Then if it was a sale with part payment, that would not be sufficient on the authority of *Nash* v. *Nash* (4) to reduce the whole into possession. Reduction into possession of part is not sufficient, since *quoad* the residue it remained in the wife, and never was taken out of her. The case of *Prole* v. *Soady* (5) is a decision in favour of our view of the case. *Forbes* v. *Phipps* (6) cannot be relied upon as an authority according to the note in the edition of Eden of 1827, p. 507.

MALINS, V.C.:—

I am not hearing this case on its merits; but there being a preliminary objection, which the Defendants contend is fatal to the

(1) 3 Atk. 20.
(2) 4th Ed. p. 114.
(3) 9 Sim. 137.
(4) 2 Madd. 133.
(5) Law Rep. 3 Ch. 220.
(6) 1 Eden, 502.

V.-C. M. 1877 WIDGERY v. TEPPER. Judgment.

right of the Plaintiffs to sue, which if it were successful would make an end of the whole matter, it is convenient that that question should be decided before the case comes on on its merits.

The case stands thus: Although Mr. *Turner* made a will, he died intestate as to a considerable part of his property. Among the property of which he so died intestate were the engravings in question in this suit and the other suit which has been partly heard before me, the right to which, therefore, devolved on his next of kin, as being undisposed of by his will. The next of kin were five in number, and one of them was Mrs. *Widgery*. There had been a decree by Vice-Chancellor *Kindersley* for the administration of *Turner's* estate; and by that decree, in 1856, the Court did declare that the engravings, and also such of the pictures, drawings, and sketches which should not have been selected by the trustees of the *National Gallery*, belonged to the five next of kin, including *J. Widgery* and *Mary Anne Turner*, his wife, in her right, in the proportions following, that was to say, as to one-fifth part thereof, to *Thomas Price Turner;* as to one other fifth part thereof, to *Mary Matthew;* as to one other fifth part thereof to *J. Widgery* and *Mary Anne Turner* his wife in her right. For the purpose of my present decision, I assume that the effect of that decree was to give Mr. *Widgery* the property. It belonged to the husband in right of his wife; and I assume that if the husband had done nothing more than rest on that decree, the wife surviving would have become absolutely entitled to one-fifth share of these engravings, the property now in question. Therefore, although Mr. *Pearson* controverts that point, it is useless to discuss it if the other objection fails. But for the present purpose I assume (and, indeed, my impression is), if nothing more had been done the right would have survived to the wife. That is my impression. Of course it is open to argument, if necessary, but in my view of the case it becomes unnecessary.

In this state of things, the husband and wife being entitled to these chattels like any other chattels, the transaction of January, 1858, takes place. That transaction, as we know very well by the evidence, was this: that *Jabez Tepper*, who was the solicitor of the parties, and who represented them in the suit for the admi-

nistration of Mr. *Turner's* estate, called the parties together, met them at his office, and said to Mr. and Mrs. *Widgery* and to the other parties, "In order to wind up the estate I will give you £500 for each of your shares." His own mother was entitled to one fifth, therefore what he had to buy up was four-fifths. Mr. *Coham Turner* declined to accept the £500, but the others did take the £500, including Mr. and Mrs. *Widgery*, who were one of the three sets. I take it the presence of Mrs. *Widgery* had no effect whatever; she was a married woman. Whatever the husband did was his act and his only; and the result is precisely the same as if Mrs. *Widgery* had not been present, as is well settled by all the authorities, which decide that an assignment of a *chose in action* or chattel by the husband and wife is the assignment of the husband only. In *Purdew* v. *Jackson* (1), although the wife joined in an assignment, it was treated precisely the same as if she had been no party to it, because she is incapable of binding herself during coverture unless it is separate property. Taking it as a sale to Mr. *Widgery*, then, on the 27th of January, 1856, Mr. *Widgery* agreed to take £500 (or it was due to him as a matter of account between him and *Jabez Tepper*) for these pictures. This is not a charge or a mortgage, like the cases cited of *Prole* v. *Soady* (2) or *Hore* v. *Becher* (3). It is not like those cases which are mere charges or mortgages on the property of the wife not actually reduced into possession, where it is decided that a mortgage or charge under these circumstances does not bind the wife surviving. But it was an attempt to make, and believed by the *Widgerys* at the time to be, a complete sale out and out of the property. Nothing can be more distinct, to my mind, than that the act of selling these chattels at that time and receiving the purchase-money was a complete parting with all interest in them, and therefore a reduction of them into possession as between the husband and wife. But in the progress of time it has turned out, as it is said (which I shall have hereafter to decide) on the assertion of the Plaintiff, that this transaction was not binding on Mr. *Widgery*, for that two material facts ought to have been communicated to him by *Jabez Tepper*, who was his solicitor, but which were not communicated

(1) 1 Russ. 1.

(2) Law Rep. 3 Ch. 220.

(3) 12 Sim. 465.

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to him. One was that *Jabez Tepper* (this is what the Plaintiffs say), the purchaser and their solicitor, possessed information which he concealed from them, namely, that an eminent valuer of such things had been called in and had fixed the value at £5000 for the purpose of probate. If that was a correct valuation, then the share on that valuation alone was worth £1000, while their own solicitor induced them to take £500. Mr. *Glasse* very fairly admitted that if those facts turn out as alleged by the Plaintiff, they are fatal to the transaction, and the transaction on that concealment cannot be supported. But they say, even if that fails, there is another ground, namely, that their solicitor, whose duty it was to protect them, entirely failed in doing so; because in protecting them, before he made a bargain for his own benefit, he was at least bound to ascertain what was the fair market value of the chattels in question, that is, what they would have produced if offered for sale in the ordinary and prudent course of business. In the case of *Turner* v. *Tepper* I have had a large body of evidence shewing that these very chattels, which for the purpose of probate had been valued at £5000, if offered for sale by public competition would have fetched at least £15,000, which would have made Mr. *Widgery's* share of one fifth, for which he was induced to take £500, worth £3000. Therefore on that ground, even if the first should fail, still if the second is sustained, it is contended that on the general doctrine of this Court it is impossible that a solicitor can sustain the transaction between himself and his client where he has obtained the property for about one-sixth part of its value. If these facts are ultimately established in evidence, it may be my duty to set aside this sale.

But what is the effect of the transaction between Mr. *Widgery* and the purchaser? Mr. *Widgery* undoubtedly intended to sell. That was his intention. The husband and wife were both alive three years after the sale; he died in 1861, and his wife in 1871; the date is immaterial, because she did survive him, and if she survived him one day it is as good as a thousand, and therefore all rights of a married woman in property of this description which could belong to her did belong to her. Both of them survived the transaction three years. Now suppose during those three years Mr. *Widgery* had found out all these facts, and had said to

Jabez Tepper, who was still alive, "I find that the said transaction which took place between us in January, 1858, was not conducted in such a manner as it ought to have been by you as my solicitor. You ought to have told me of that valuation, and you ought to have told me what was the value of the things, and if you did not know you ought to have ascertained, and I am advised, under these circumstances, that I have a right to set aside that transaction;" and suppose *Tepper* had offered to give him another £500, and *Widgery* had accepted the offer, and had given him an absolute release, will any one say that under such circumstances the sale confirmed for further consideration deliberately would not have given *Jabez Tepper* a perfectly good title. Mr. *Glasse* admits it would. If that would have given him a good title, what was the position? The contract was not void. A contract to sell at an inadequate price, or under circumstances where facts ought to have been disclosed which were not disclosed, giving the vendor the right to set aside the sale, does not make the sale void; but it makes it voidable, because a man who has a right to apply to set aside the sale on such grounds may say, "I have a right, but I will not exercise it," and the consequence is he abandons it, and the original purchaser acquires a good title, or he may release it. It is a settled rule of law that you may confirm a voidable act, but an act which is void is incapable of being confirmed. I might refer to black-letter books, but anybody who has studied the principles of law knows perfectly well—from *Coke* on *Littleton* downwards, it is laid down—that a void act cannot be confirmed, but a voidable act can. This was a transaction capable of being confirmed. Why? Because it was voidable, and voidable only. In whom, then, was the right to avoid it? Certainly not in the wife, but in the husband. The right of avoiding this at any time he thought fit being, in my opinion, in the husband, it necessarily from him devolved on his executors as part of his general estate.

The case of *Nash* v. *Nash* (1) was cited. That was a case where the father gave to his daughter on her marriage a cheque for £10,000, and she went to the bankers and changed the cheque, and got a promissory note payable to herself for £10,000, which she handed over to her husband. The note was payable to her,

(1) 2 Madd. 133.

V.-C. M. 1877 WIDGERY v. TEPPER. Judgment.

as I collect. It is not very distinctly stated, but I think that is agreed to be the effect of it. The bankers gave a note payable to the wife. The husband was in possession of that note; he received the interest, and he also received £1000 of the £10,000. What had he reduced into possession? £1000. What had he done with regard to the £9000? He got a promissory note payable to the wife. No doubt Sir *J. Leach* had the case argued before him. He was obliged to decide it. I decide many cases which are very elaborately argued before me, but which I have not the shadow of a doubt about ten minutes after I have heard it opened, but it is my duty to hear the argument. I have no doubt in my own mind, but I always keep my mind, as well as I can, in suspense till I am satisfied my first impressions are wrong. I do not think there was any difficulty in *Nash* v. *Nash* (1). The wife having got £10,000, the husband received only £1000. It was clear there was no reduction into possession as to the £9000, and I used the expression that I thought it was hardly worth arguing, though, I need scarcely say, without any idea of disrespect to so distinguished a Judge as Sir *J. Leach*.

What is there here? Mr. *Widgery* did all he could to dispose of the things. In consequence of his act they were handed over to *Jabez Tepper*. I must consider they were in his possession in consequence of Mr. *Widgery's* act. He had that right to possession, and in Mr. *Widgery*, beyond all doubt, to my mind, there was vested the legal right of confirming it if it was voidable. They say now it was not voidable. If it was not voidable, the bill, when it comes on for argument, will have to be dismissed.

On these grounds, I am of opinion the right of suit, if Mr. *Widgery* himself were now alive, would certainly be in him, and as he is dead, I am of opinion it is in the executors. I make no order, but simply overrule the preliminary objection, and decide that the Plaintiffs have a right to sue as executors of *J. Widgery*. The case will, therefore, have to be heard on the merits.

Solicitors: *Whitakers & Woolbert; J. Turner & Son; Guscotte, Wadham, & Daw.*

(1) 2 Madd. 133.

In re LONDON AND PROVINCIAL CONSOLIDATED COAL COMPANY.

V.-C. M.
1877
April 19.

Company—Signatories to Memorandum—Power of Directors to refuse Allotment.

Upon the formation of a company nine persons signed the memorandum of association. At a preliminary meeting, attended by four of these persons, a resolution was passed that no shares be allotted to three of the signatories to the articles, and with their consent the deposit money was repaid to them. The articles contained no power to accept surrenders of shares:—

Held, that the directors had no power to remit the shares; and that all those who had signed the articles were liable as contributories upon the winding-up.

Statement.

THIS was a motion in the winding-up of the *London and Provincial Consolidated Coal Company, Limited*, that so much of the certificate of the Chief Clerk, dated the 16th of March, 1877, as certified that *Joseph Hadley*, *Henry P. Norris*, and *William Jacob* had been excluded from the list of contributories might be discharged; and that the said list of contributories might be varied by including therein the names of the said *Joseph Hadley*, *H. P. Norris*, and *William Jacob*, as contributories of the company in respect of the number of shares set opposite to their respective names.

This company was formed by articles of association dated the 30th of March, 1875, and it was registered on the 7th of April, 1875. The articles of association were signed by nine persons, including *Hadley*, *Norris*, and *Jacob*, the persons who now sought to have their names excluded from the list of contributories for five, five, and twenty shares respectively. Upon the negotiations for the establishment of the company it was arranged that the offices of the company should be those of Messrs. *Hadley* & *Norris*, who were land agents, that *Hadley* should be the secretary, and that *Jacob* should be appointed a director. Several preliminary meetings of the promoters took place, at which disagreements arose between the parties, and finally, at a meeting of the directors, held on the 11th of May, 1875, at which there were present *William Jacob* (chairman), *E. G. Burls*, *H. T. Holloway*,

V.-C. M. 1877 *In re* London and Provincial Consolidated Coal Company.

Statement.

and *F. G. Danvers*, resolutions were passed that the offices of the company be removed from the premises of Messrs. *Hadley & Norris;* that Mr. *James Bellamy* be appointed secretary of the company in the place of Mr. *J. Hadley*, who expressed his willingness to retire; that the following shares be allotted (then followed the names of twelve persons for 132 shares in all); and it was further resolved that the following shares be not allotted: *W. Jacob*, twenty shares; *J. Hadley*, five shares; *H. P. Norris*, five shares; *A. Fraser*, two shares; and that cheques be drawn in favour of these four persons by Mr. *W. Jacob*, returning their deposits in full.

It was well understood, upon the affidavits in support of the application, that all three applicants should be disconnected with the company; that they would not have joined it or signed the articles except for the advantage they would have gained by one of the two, *Hadley* or *Norris*, being secretary, and their offices being used as the offices of the company, and *Jacob* being appointed a director. None of their names were entered on the register of members, nor were they afterwards in any way connected with the company. If they had been treated as members they would have transferred their shares.

A resolution to wind up the company voluntarily was passed on the 11th of April, 1876, and on the 30th of June following an order was made that the voluntary winding-up should be continued under the supervision of the Court.

Article 13 of the articles of association, which was particularly relied upon, was in the following terms: "The directors may, if they think it advisable, issue any of the shares of the company at such a premium as they deem fit, or may from time to time issue, sell, or dispose of any such shares at such a discount, or on such other conditions as they may think fit, whether such shares have or have not been previously forfeited or cancelled under the power hereinafter conferred."

Argument.

J. Pearson, Q.C., and *Jolliffe*, for the official liquidator:—

Our application is that these three persons, *Hadley, Norris*, and *Jacob*, may be placed upon the list of contributories. They all three signed the articles of association for the number of shares set

opposite to their names, and for those shares they are now liable. The directors had no power to remit the shares or remove the shareholders from the list. As signatories of the articles they bound themselves, under the 23rd section of the *Companies Act*, 1862, to carry out the undertaking as members of the company; and the provisions of the Companies Acts would be entirely nugatory if the directors, after signing the articles, could of their own accord meet together and resolve that none of them should be liable for the shares they had signed for. It was decided in *Duke's Case* (1) that the memorandum of association irrevocably binds a subscriber thereof to contribute the proportion of the capital for which he subscribes. This was followed by *Evans' Case* (2) and by *Sidney's Case* (3). In these cases the names were not placed upon the list of shareholders, but the parties had signed the memorandum, and that was sufficient to bind them. In *Hall's Case* (4) a deed was actually executed by which a director who had signed the memorandum was released from all future calls and indemnified against past liabilities; but it was held that the deed did not operate as a surrender and forfeiture of the shares. Then there is *Levick's Case* (5), which decided that an official liquidator was not barred by lapse of time. Upon all these authorities it is clear that the directors had no power to let off or exonerate these persons, and that they must be placed upon the list of contributories.

Higgins, Q.C., and *W. W. Karslake*, for the three contributories:—

It has been commonly supposed that a man is more conclusively a holder of shares if he has signed the memorandum of association; but that is not so, because in *Snell's Case* (6), where a director of the company had applied for the number of shares for which he had subscribed and had paid a deposit on them, and afterwards withdrew from the office of director and applied to have his shares cancelled, it was held that the board of directors, who had power to accept the surrender of shares, were justified in cancelling the shares. In this case there was power given to the

(1) 1 Ch. D. 620.
(2) Law Rep. 2 Ch. 427.
(3) Ibid. 13 Eq. 228.
(4) Law Rep. 5 Ch. 707.
(5) 40 L. J. (Ch.) 180.
(6) Law Rep. 5 Ch. 22.

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directors to issue, sell, or dispose of shares on such conditions as they should think fit, whether such shares had or had not been previously forfeited or cancelled. Consequently there was a power implied to forfeit or cancel shares or to refuse an allotment. Here all the persons who were then members of the company consented to release these persons, and there was no necessity for a special resolution of the company under the Act of 1862, sect. 51. If these persons had accepted the shares, and then disposed of them to *bonâ fide* purchasers, they would have escaped any liability, and would have been in the same position as if the shares had been cancelled. This was a refusal of the directors to allot which was quite within their powers under the 13th clause of the articles. In *Dixon* v. *Evans* (1) the directors had no express power to cancel shares, but it was held that they might compromise with a shareholder and remove his name from the register as if his shares had been cancelled; and in *Teasdale's Case* (2) it was held that a special resolution had the effect of varying the articles and enabling the directors to accept surrenders of shares. And again, in *Thomas' Case* (3), the directors were held not to have acted *ultrà vires* in relieving the secretary from the shares standing in his name, upon his retiring from his office. The same principle was acted upon in *Wright's Case* (4), where it was held that the cancellation of shares by directors where there were valid grounds for claiming cancellation was effectual; and *Mackley's Case* (5) is quite as strongly in our favour, for there the memorandum of association was subscribed by a shareholder; but as he was never treated as such, and his name never appeared on the register of members, he was declared not to be liable as a contributory.

J. Pearson, in reply:—

In this case there never was a meeting of shareholders, and therefore no resolution could be passed under the 51st section of the Act of 1862. There was nothing more than a meeting at which four members were present, and one of those—Mr. *Jacob*—was in the chair, and is now seeking to escape his liability.

(1) Law Rep. 5 H. L. 606.
(2) Ibid. 9 Ch. 54.
(3) Law Rep. 13 Eq. 437.
(4) Ibid. 7 Ch. 55.
(5) 1 Ch. D. 247.

MALINS, V.C.:—

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1877
In re LONDON AND PROVINCIAL CONSOLIDATED COAL COMPANY.
Judgment.

This is a company which was formed by memorandum and articles of association dated the 30th of March, 1875, and registered under the *Joint Stock Companies Act* on the 7th of April in the same year. The memorandum of association, as required by law, was signed by seven persons, three of whom are seeking to have their names taken off the list of contributories, two of them for only five, one of them for twenty shares. The registration of the company having occurred on the 7th of April, the fact relied upon for this purpose is that a meeting was called of the directors, and held on the 11th of May following, at which a resolution was passed that the following shares be allotted, and that the secretary do issue a letter of allotment accordingly; then come the names of the persons to whom the shares were allotted, and then it was resolved that the following shares should not be allotted: to *Jacob* twenty shares, *Norris* five shares, and *Hadley* five shares; those are the three shareholders in question. These gentlemen contend that the effect of what was done was, that they never were actual allottees of the shares, but that, on the contrary, there was a refusal to allot the shares; that is to say, there was a refusal by the directors, including Mr. *Jacob*, who was one of the directors, and a resolution by them that those shares should not be allotted to himself and them; but that would be a very convenient mode for a person who had rendered himself liable by signing a memorandum of association to free himself from that liability. However, no shares were allotted, these gentlemen have never had any shares allotted to them, they have never been on the list of contributories, and no application or attempt was ever made to put them on until after the supervision order, which followed on the resolution to wind up voluntarily.

Now, the law on the subject as to persons signing a memorandum of association, and their position, has long been settled, that persons who sign a memorandum of association of a company are, by the 23rd section of the *Companies Act*, 1862, made contributories of the company. The words are that "Subscribers of the memorandum of association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registra-

V.-C. M. 1877 *In re* London and Provincial Consolidated Coal Company. Judgment.

tion of the company shall be entered as members on the register of members hereinafter mentioned; and every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company." Accordingly a great number of cases have been cited, including *Evans' Case* (1), *Sidney's Case* (2), which was decided by myself, *Levick's Case* (3), as well as *Hall's Case* (4), which is also a very strong case, and the decisions have been uniform that wherever any person signed a memorandum of association, he must be put on the list of contributories, although no shares may have been allotted to him.

Levick's Case is a remarkably strong authority, because Mr. *Levick* signed the memorandum of association for fifty shares in January, 1866—that was in the *Marseilles Land Company*. The company was registered on the 18th of January, 1866, and the report states that the directors were appointed on the 24th of February in that year. The company was wound up on the 23rd of September, 1867, which was a year and a half after its formation, and Mr. *Levick's* name had not, up to that time, been placed on the list of shareholders. It was held, notwithstanding the lapse of time, that Mr. *Levick* must be made a contributory. That is a case, therefore, where the contributory had signed the memorandum of association but no shares had been allotted to him, and yet, nevertheless, that was held not to be sufficient to relieve him from his liability as a shareholder, because he had of course signed the memorandum of association.

Then, in *Hall's Case*, Mr. *Hall*, one of the directors of the company, subscribed the memorandum of association for 500 shares, but only 250 were allotted to him. The articles of association, among other clauses relating to forfeiture, gave power to the directors to accept from any shareholder the surrender and forfeiture of his shares. The company were expressly prohibited from dealing in shares. The directors agreed to release Mr. *Hall* from all liability with respect to the 250 shares allotted to him, and a deed was executed and sealed with the company's seal, and approved at a general meeting of the shareholders, by which *Hall*

(1) Law Rep. 2 Ch. 427.
(2) Ibid. 13 Eq. 228.
(3) 40 L. J. (Ch.) 180.
(4) Law Rep. 5 Ch. 707.

was released from all future calls, and indemnified against all past liability in respect of those shares. Afterwards the company was wound up, and it was held, affirming the decision of the Master of the Rolls, that the deed of release and indemnity was not an acceptance of a surrender and forfeiture under the articles, but was a dealing in shares by the company, and as such was *ultrà vires* on the part of the directors and the company, and consequently that *Hall* must be on the list of contributories for all the shares for which he had signed the memorandum of association. This was therefore a remarkably strong case, because, having signed for 500 shares, the directors had exercised their discretion by allotting him 250 only: nevertheless he was put on the list for the remaining 250 shares, making up the 500 shares for which he had subscribed the memorandum of association.

These cases, I think I may say, are perfectly uniform on this subject, and it is admitted they are so, and Mr. *Higgins* relies wholly, therefore, on *Snell's Case* (1); but that was a very different case from the present. There, "*Snell*, a subscriber of the memorandum of association of a company, who was also a director, applied for a number of shares for which he had subscribed, and paid a deposit on them. Before any shares had been allotted to him, or his name had been entered on the share register, he withdrew from the office of director, and applied to have his application for shares cancelled. The directors, who had power under the articles to accept the surrender of shares, cancelled the application, and returned the deposit. The company was afterwards wound up. Held, reversing the decision of the Master of the Rolls, that the surrender of the shares was valid, and that *Snell* was not a contributory." Now, upon what ground was that put? That was a case where the shareholder had applied to have his shares cancelled, and a meeting of the board was held, at which it was resolved to accede to his application, and on the 15th of September the secretary returned him his deposit of £20, and from that time he was not treated as a shareholder. The 38th clause of the articles of association was as follows: "The directors may, if they think fit, accept the surrender or forfeiture of his shares

(1) Law Rep. 5 Ch. 22.

V.-C. M. 1877 — *In re* London and Provincial Consolidated Coal Company. — Judgment.

by any shareholder desirous of surrendering or forfeiting them, on such terms as the directors may think fit." Therefore, though Mr. *Snell* would undoubtedly have been a contributory in consequence of having signed the memorandum of association, there was a power of accepting the surrender or forfeiture of his shares by the directors. The directors had, in fact, accepted the surrender, and although the Master of the Rolls thought that insufficient, Lord Justice *Giffard* said he could not agree with the Master of the Rolls in that case. The reason he gave was because although everything was done which was requisite to sever the connection of Mr. *Snell* with the company, as he had signed the memorandum for twenty shares, he became a member of the company for that number of shares, and in strictness his name ought to have been upon the register. Therefore he acceded fully to the usual rule that signing the memorandum constitutes a man a shareholder, and it is perfectly clear that the only ground on which Mr. *Snell's* name was removed from the list was, not that he had not been a shareholder, because it is said expressly that he was, but that he had ceased to be so upon the strict exercise of the power vested in the directors to accept the surrender of the shares. Therefore, as there is no such power here, and certainly if there was it was most improperly and irregularly exercised, I cannot say that *Snell's* case applies.

But there were other cases relied on by Mr. *Higgins*, that in the House of Lords, and the other cases he had mentioned to shew that there is a power of releasing and compromising in respect of these shares, and to shew that in this case there should be held to have been a compromise; but if I were to accede to this application on the part of these three gentlemen, it seems to me to follow that the persons who sign the memorandum of association, seven in number, as provided by the Act, have only—as of course they may very well do—to call a meeting, and at that meeting to resolve that they shall all be released from their shares and the liability attaching to them, or all but one, or all but two, and the consequence would be that although those persons who sign a memorandum of association must of course be contributories, as expressly stated by the Act of Parliament, they may at any time

escape their liability, and say by resolution among themselves that every one who signed the memorandum, except one or except two, as the case may be, shall be freed.

Now, by this resolution they resolve that the number of signatories shall be reduced to four, and that no shares shall be allotted to the other three, and, therefore if those who have signed a memorandum of association can resolve not that they shall not be members, but that no shares shall be allotted to them, they would have it in their power to defeat the law altogether.

There is only one other case, viz., *Mackley's Case* (1), which I think I need refer to. That was a case which I well remember, because it was a very peculiar case in its circumstances. In that case a lady's husband, who was sought to be put on the register, had originally signed the memorandum of association, and, therefore, was no doubt liable as a contributory. He became a director, but he took no further proceedings in the management, and was never treated as a shareholder, and his name never appeared in the register of the company. It was contended, therefore, that he was not liable as a contributory, and the very ground on which I decided the case was that though originally a contributory and liable to have his name put on the list, still, in order to make him a contributory, he ought to have had the advantage of having the shares of which they had deprived him by alloting them to other persons. There I said that as there were no shares which Mr. *Mackley* could have had if he had wanted them, the company were not in a position to say that they would continue to hold him liable for the shares for which he had signed. And on that ground, and that ground alone, it was that I decided he was not a contributory, and I did not therefore accede to the application to put his name on the list.

It appears to me that this case has not been brought within any of the excepted cases, and as the ordinary rule is that if persons sign a memorandum of association and nothing has been done to relieve them of the responsibility they are under in consequence, they must therefore be put on the list of contributories, and these gentlemen must accordingly be put on, discharging the order that was made in Chambers to the contrary. My Chief Clerk came to

(1) 1 Ch. D. 247.

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the conclusion in the first instance that they ought not to be put on. Then it came before me in Chambers upon summons to vary, and, finding that I could not attend to all the authorities proposed to be cited in Chambers, I at once said it must come into Court to be argued, and dismissed the summons; but although I have differed from my Chief Clerk, my dismissing the summons was not, of course, a judicial decision of mine, but was merely a convenient mode of adjourning the matter into Court. The result, therefore, is that these gentlemen must be placed on the list.

Then as to the costs. The liquidator asks that these persons may not have their costs out of the estate, but I cannot help thinking this is rather a hard case, since it was agreed by all the parties between themselves that they should not be members, and they never were put on the list. It is not very gracious now to turn round and endeavour to make them liable. I am of course bound to follow the law, but I think, under all the circumstances, the costs of all parties should come out of the estate.

Solicitors: *Cooke & Jonas; F. Jacob.*

In re KIRKSTALL BREWERY COMPANY, LIMITED AND REDUCED.

V.-C. B.
1877
March 1.

Company—Reduction of Capital—Companies Act, 1862, *s.* 12—*Companies Act*, 1867, *s.* 9.

Sect. 9 of the *Companies Act*, 1867, is to be read together with and as part of sect. 12 of the *Companies Act*, 1862; and the word "capital" in the later enactment means the same thing as the same word in the former—that is to say, nominal capital only.

Where the capital of a company has been issued and fully paid up, the Court has no jurisdiction to confirm a resolution for reduction of such capital.

In re Ebbw Vale Steel, Iron, and Coal Company (1) followed.

In re Crédit Foncier of England (2) not followed.

ADJOURNED SUMMONS.

Statement.

The *Kirkstall Brewery Company, Limited*, was incorporated by registration in 1871 with a capital of £110,000 in 8000 ordinary shares of £10 each, and 3000 perpetual £6 per cent. preference shares of £10 each.

The 151st of the articles of association was as follows:—

"All dividends on shares shall be declared by the ordinary meetings, and shall be made only out of the clear profits of the company" . . .

All the capital had been subscribed for, and was fully paid up.

By a special resolution passed on the 12th of October and confirmed on the 9th of November, 1876, it was resolved that the company might from time to time by special resolution so far modify the conditions contained in its memorandum of association as to reduce its capital; and by another special resolution passed on the 22nd of November and confirmed on the 13th of December, it was resolved that the section of the memorandum of association which defined the amount of capital should be repealed, and that in lieu thereof a provision be substituted to the effect that the capital of the company be £55,000, divided into 8000 ordinary shares of £5 each, and 3000 perpetual £12 per cent. preference shares of £5 each.

(1) 4 Ch. D. 827. (2) Law Rep. 11 Eq. 356.

See Mem. Companies Act 1877 (40 & 41 Vict c 26)

V.-C. B.
1877
In re KIRKSTALL BREWERY COMPANY, LIMITED AND REDUCED.
Statement.

The present petition was presented by the company for an order confirming the last-mentioned resolution.

It stated that the company had paid no dividend, which was to a great extent due to the fact that the company originally purchased the brewery business, goodwill, and assets at far more than their true value. Unless the capital were reduced so as to represent and be equivalent to the true value of the premises, the business of the company could never be carried on at a profit.

The petition stated that the capital, if reduced as proposed, would on reduction represent the true value of the concern; and that the reduction would not prejudicially affect any creditor or other person having claims against the company, but would enable the company to exclude from their accounts and balance sheets the present item, "Depreciation of assets," which, as matters now stood, must be wiped off before any dividends could be declared out of profits.

It then alleged that it was expedient and for the benefit of the company and its creditors that the resolution passed for the reduction of capital should be confirmed by the Court, "so that the company may for the future be able to carry on business at a profit, and so that future creditors of the company may not be deceived by the nominal value of the company's capital continuing to appear in the memorandum of association at double the true value of the concern."

It appeared that the company had paid £109,860 for the property; and in the balance-sheet issued in June, 1876, there appeared an item, "Depreciation of assets on re-valuation, May 31st, 1876, £50,565 5*s.* 3*d.*"

On the 9th of January, 1877, an order was made, on the application of the Petitioners, fixing the 16th of February as the date with reference to which the list of creditors entitled to object to the proposal should be made out; and ordering an inquiry what were the debts, claims, and liabilities of the company on that date; and that notice of the presentation of the petition should be advertised.

In accordance with the order, advertisements had been issued, and a list of creditors made out.

The company now feeling some doubt as to whether the Court would not hold that it had no jurisdiction to confirm the resolution, took out, on the 16th of February, a summons that the time within which the list of creditors should be brought into Chambers might be extended until the 1st of May, 1877, with a view of taking the opinion of the Court as to whether it had jurisdiction to make a confirmation order.

Argument.

Kay, Q.C., and *William Barber, ex parte*, for the company :—

In this case the reduction sought, if carried out, would be a reduction, not merely of nominal capital, but of actually subscribed for and fully paid-up capital. Now the Master of the Rolls, in *In re Ebbw Vale Steel, Iron, and Coal Company* (1), has decided that the reduction contemplated by sect. 9 of the Act of 1867 is a reduction of nominal capital only, either by not issuing more shares, or by subdividing the shares, or otherwise, and not a reduction of actually paid-up capital.

There are two cases not consistent with that decision, namely, *In re Crédit Foncier of England* (2), in this branch of the Court, and *In re National Arms Company* (before Vice-Chancellor *Malins*, Feb. 2, 1877); but when the question comes to be examined, it seems that the decision of the Master of the Rolls is the true one, because sect. 9 of the *Companies Act*, 1867, was intended to alter sect. 12 of the *Companies Act*, 1862, and the two sections must be read together; and there can be no doubt that by the word "capital" in the earlier statute is meant nominal capital only.

Judgment.

BACON, V.C.:—

I think the words "its capital" must mean the same thing in both Acts of Parliament.

One can see many reasons why sect. 9 of the Act of 1867 should be read as the Master of the Rolls has read it. The company may not have issued as many shares as they intended to issue, or they may have got to the limit of all they intended to raise by means of shares.

I do not think these points were considered in *In re Crédit*

(1) 4 Ch. D. 827. (2) Law Rep. 11 Eq. 356.

V.-C. B. 1877 — *In re* KIRKSTALL BREWERY COMPANY, LIMITED AND REDUCED.

Foncier of England (1); and what the circumstances were in *In re National Arms Company* I do not know.

There will be an order that the proceedings shall not go further; and the words "or reduced" will be removed from the title of the company.

Solicitors: *Williamson, Hill, & Co.*

V.-C. B. 1877 — *April* 13.

FIELD *v.* SEWARD.

[1873 F. 86.]

Will—Administration—Bequest of Share, subject to Deduction for Advances—Interest on Advances to be computed from Death of Testator.

17 Ch D 763-7

Testator, after bequeathing a share of mixed residue to one of his sons, stated that he had advanced sums amounting to £2550 to the son, and directed his trustees and executors to deduct the said sum of £2550 from the share so bequeathed:—

Held, that the son was chargeable with interest at £4 per cent. on the £2550 from the death of the testator, and not merely from the end of a year after the death.

Statement.

FURTHER CONSIDERATION.

Henry Seward, who died on the 29th of September, 1871, by his will, dated the 27th of October, 1869, gave one-ninth of his residuary real and personal estate to his son *John Seward* to and for his own absolute use and benefit. After reciting that he had advanced his said son *John Seward* the sum of £2550 on his promissory notes, dated respectively the 6th of September, 1862, and the 27th of March, 1869, testator declared his will to be that his executors and trustees should, and he thereby authorized them to, deduct the said sum of £2550 from the one equal ninth part or share bequeathed to his said son *John*.

An administration decree having been made on the 30th of April, 1874, the Chief Clerk by his certificate, dated the 14th of February, 1877, found amongst the items of personal estate outstanding the sum of £2550 due from *John Seward*; and amongst the questions now arising on further consideration, one was what

(1) Law Rep. 11 Eq. 356.

interest, and from what date, *John Seward* was to be charged with on this sum of £2550.

V.-C. B. 1877 FIELD v. SEWARD. Argument.

Swanston, Q.C., and *Frederic Thompson*, for the Plaintiff.

Sir *H. Jackson*, Q.C., and *North*, for Defendants, residuary legatees:—

Interest must be computed on the advances from the death of the testator: *Andrewes* v. *George* (1); *Hilton* v. *Hilton* (2).

In a note to *Andrewes* v. *George*, Mr. *Simons*, the reporter, suggests that where children have been unequally advanced, and the property is not distributable until the end of a year from the death, the Court would, perhaps, direct interest at 4 per cent. to be computed on the advances from the end of the year. But though not distributed until the end of the year, the property is really divisible at the death. As much should be done as possible to remedy the inequality, and all that can be done is to charge the advanced child with interest from the death, which is, in fact, the period of division, though not of distribution.

Locock Webb, Q.C., and *Shebbeare*, for an infant Defendant, supported the same view.

Hemming, Q.C., and *Millar*, and *Kay*, Q.C., and *A. T. Watson*, for other parties.

Kay, Q.C., for *John Seward*:—

If Mr. *Seward* had been in possession of the share since the death, he might be chargeable with interest from the death. But he has never been in possession of the share. Consequently he is not chargeable with interest at all.

At the very utmost, as he will not get interest until the expiration of a year from the death, he is not to be charged with interest until that date.

In the cases cited the directions were very special.

BACON, V.C.:— Judgment.

I thought at first that interest must be charged from the date of a year after the testator's death. But it is necessary, in order

(1) 3 Sim. 393. (2) Law Rep. 14 Eq. 468.

V.-C. B. 1877 FIELD v. SEWARD. Judgment.

to carry out the testator's intention, that there should, as far as possible, be equality. Then, if this share produces interest, and the fund with the interest it produces is to be divided equally, you must charge the advance with interest in order to produce equality. There is no other means of doing it. The advanced son keeps the £2550. Is he also to keep the interest for a year which it would have produced? If he withholds for a year the contribution to the common fund, he must also be charged with the interest which it has produced during such withdrawal.

Upon second thoughts, therefore, I think the contention that *John Seward* is chargeable from the death of the testator is the correct one. It is not only just in itself, but it seems to be covered by the two authorities which have been cited.

Minutes accordingly.

Solicitors: *R. Miller & Wiggins; T. H. E. Foord; Keene & Marsland.*

V.-C. B. 1877 *April* 21.

In re ROYLE. FRYER *v.* ROYLE.

[1877 R. 49.]

Practice—Creditors' Administration—Action—Indorsement of Writ.

In a creditor's action for the administration of an intestate's real and personal estate the writ must be indorsed with a claim by Plaintiff "on behalf of himself and all other creditors."

Worraker v. *Pryer* (1) followed.

Statement.

THIS was an action by a creditor for the administration of the real and personal estate of an intestate. The writ was indorsed in the form of General Indorsements under Rules of Court, 1875, App. A., Part II., Sect. I., Form 1: "The Plaintiff's claim is as a creditor of *X. Y.*, deceased, to have the real and personal estate of the said *X. Y.* administered."

Argument.

E. S. Ford, for the Plaintiff, called attention to the point, and mentioned that although in *Cooper* v. *Blissett* (2) it was held by

(1) 2 Ch. D. 109. (2) 1 Ch. D. 691.

Vice-Chancellor *Hall* that a single creditor could have administration of the real and personal estate of his deceased debtor without suing "on behalf of all other the creditors," it had been subsequently held by the Master of the Rolls in *Worraker* v. *Pryer* (1) that where there was no devise of the real estate to trustees with power to sell and give receipts, the Plaintiff must sue on behalf of himself and all other creditors, and the writ was accordingly amended in that case.

Herbert Smith, for the Defendants.

Judgment.

BACON, V.C., following *Worraker* v. *Pryer*, directed the writ to be amended by making it an action by Plaintiff on behalf of himself and all other the creditors.

Solicitors: *W. Lane; Royle.*

(1) 2 Ch. D. 109.

V.-C. H.
1877
March 9.

PORTER *v.* BADDELEY.

[1876 P. 89.]

Will—Gift of Residue to Wife for Life—Long Annuities—Conversion.

Testator gave the residue of his estate, real and personal, to trustees to pay to his wife the rents, issues, and profits for life for her own absolute use and benefit, and after making bequests of leaseholds, but not directing conversion, and of moneys, he gave the residue of his estate to five persons named equally. He authorized and empowered his trustees to allow the moneys which he possessed to remain in the same state of investment in which they should find them at his decease, unless circumstances should render it advisable to dispose of his bank shares. The testator's estate consisted, *inter alia*, of a sum of Long Annuities:—

Held, that the widow was not entitled to enjoy the annuities in specie, but that they must be treated as having been converted at the death of the testator.

Order as in *Brown* v. *Gellatly* (1).

Statement.

SPECIAL CASE under the 13 & 14 Vict. c. 35.

Charles Baddeley, who died in July, 1875, by his will, dated in January, 1875, gave all the residue of his estate, real and personal, unto the use of his wife and *C. Porter*, upon trust to pay his debts, funeral and testamentary expenses, and subject thereto to pay to or permit his wife to receive the rents, issues, and profits of all his said estate for her life for her own absolute use and benefit, and from and after her decease he directed his trustees to stand possessed of his said real and personal estate, and as to his leasehold house, 40, *Bloomsbury Square*, upon trust to sell the same and to stand possessed of the proceeds as part of the residue. The testator then made a disposition of three other leasehold premises in favour of the persons named. There was no direction for conversion, but as to one of these bequests it was to be subject to certain payments, and as to all of them they were to be subject to the covenants in the leases. The testator bequeathed to his wife a policy of insurance upon her own life and the benefits arising therefrom, and four shares in a public company absolutely. After bequeathing some pecuniary legacies the testator gave the residue of his estate, subject to the bequests thereinbefore contained, unto

(1) Law Rep. 2 Ch. 751.

five persons named, or such of them as should be living at the decease of his wife, in equal shares, and then, after empowering his trustees to sell his leasehold house first above referred to in the lifetime of his wife, with her consent, as they should think fit, he said: "I also expressly authorize and empower the trustees or trustee for the time being of this my will to allow all such moneys as I possess at the time of my decease to remain in the same state of investment in which they shall find the same at my decease, unless circumstances should arise that would render it advisable to dispose of my *London Joint Stock Bank* shares." The testator appointed his wife and two other persons to be the executors and trustees of his will. The estate consisted of four leasehold premises, twelve shares in the bank, £700 New 3 per Cents., and £78 10*s.* Long Annuities, expiring in 1885, and the question was whether the widow was entitled to receive during her life or until 1885 the £78 10*s.* as income, or whether those annuities should be sold and the proceeds invested, and the income of the investment paid to her for life, or whether such annuities should remain unsold, and some, and if so, what, proportion of the half yearly payments should be paid to her for life, and how the residue of each half yearly payment should be dealt with. The parties interested under the will were all living.

Statement.

Herbert Percival, for the Plaintiffs, the trustees, stated the facts.

Argument.

Rendall, for the Defendant, the widow:—

There is in the will no direction for the conversion of the property, excepting as to the house in *Bloomsbury Square*, which the trustees might sell with the widow's consent; and it is submitted that all the parties will be entitled to enjoy their bequests in specie; but the only question for determination now is as to the Long Annuities, and I contend that the widow is entitled to receive the whole annual payment of £78 10*s.*, and that this construction of the will is supported by the cases of *Brown* v. *Higgs* (1), *Lord* v. *Godfrey* (2), *Wilday* v. *Sandys* (3), and *Howard* v. *Kay* (4).

(1) 4 Ves. 708; 5 Ves. 495; 8 Ves. 561.
(2) 4 Madd. 455.
(3) Law Rep. 7 Eq. 455.
(4) 27 L. J. (Ch.) 448.

V.-C. H. 1877 PORTER v. BADDELEY. Judgment.

Everitt, for the Defendants, parties entitled in remainder, was not called upon.

HALL, V.C.:—

I am of opinion that there is nothing in this will which enables me to hold that the widow ought to enjoy these annuities in specie. The cases which have been referred to contain express descriptions of the funds, and consequently they are all distinguishable from the present. This being my view of this case, I hold that all that the widow is entitled to is a declaration of a trust of these annuities for her benefit after they have been converted and the proceeds invested.

Without any direction to convert, the law implies that, as the funds are perishable, there ought to be a conversion for the benefit of all parties interested. The clause expressly authorizing and empowering the trustees to allow all moneys to remain in the same state of investment on which they should find the same as at the testator's decease is a general one, and a general provision of that kind I cannot consider as being, as between the beneficiaries, applicable to that part of his personal estate which was invested in terminable annuities.

I hold, therefore, that there is nothing in this will which shews that the testator intended that this particular investment should be enjoyed by his widow in specie. There have been other decisions upon the point, and I think that the case of *Re Llewellyn's Trusts* (1) is more applicable than the cases which have been cited, though it is true that there were other circumstances in that case, such as a power to the trustees to convert. The case of *Brown* v. *Higgs* (2) is of a different class, and has no application to the present. The testator died in July, 1875, and these annuities must be treated as having been converted at his death, and the proper amount of income must be paid to his widow. The order will be as in *Brown* v. *Gellatly* (3).

Solicitors: *Clarkes, Rawlins, & Clarke; Desborough & Son.*

(1) 29 Beav. 171. (2) 4 Ves. 708; 5 Ves. 495; 8 Ves. 561.
(3) Law Rep. 2 Ch. 751.

In re YEARWOOD'S TRUSTS.

V.-C. H.
1877
March 16.

*Illegitimacy—Non-Access—Evidence of Husband—*32 & 33 *Vict. c.* 68.

H. Y., who made his will, and died in March, 1875, gave the residue of his personal estate after the death of his daughter *A.* (described as the wife of *W. A.*) in trust for all or any of her children who should attain twenty-one or marry. The daughter died in April, 1876, without having made any appointment. On petition by one child, who claimed to be the only legitimate child of the daughter, the evidence of *A.*'s husband shewing that three children of *A.* born during the marriage and after the Petitioner were illegitimate was admitted; and it was *held* that the Petitioner only was interested in the fund.

In re Rideout's Trusts (1) considered.

Statement.

THIS was the petition of *E. V. A.*, an infant, born on the 13th of May, 1866, by his father as next friend, claiming to be the only child of the marriage, after mentioned, of his father and mother.

Henry Yearwood, who died on the 20th of March, 1875, by his will, dated the 8th of that month, devised and bequeathed his real estate and the residue of his personal estate to two trustees and executors, upon trust for sale and conversion, and to stand possessed of the produce, after payment of his debts and legacies and funeral, &c., expenses, upon trust as to one-third part to invest the same and to pay the annual income to his daughter *A. I. A.*, described as the wife of *W. A.*, for life for her separate use, and after her decease to stand possessed of both capital and income in trust for all or any one or more exclusively of the children of *A. I. A.* in such shares as she, whether covert or sole, should by deed or will appoint, and in default of appointment in trust for all the children, or any of the children, of *A. I. A.*, who either before or after her death should, being sons, attain the age of twenty-one years, or being daughters, attain that age or marry under it, and if more than one, in equal shares. There was a direction to the trustees, after the death of his daughter to apply the income of the share of each child towards his or her maintenance and education.

A. I. A. died in April, 1876, without having exercised her power

(1) Law Rep. 10 Eq. 41.

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Statement.

of appointment. The petition set forth that in July, 1865, *A. I. A.* intermarried with *W. A.*; that they cohabited at intervals until September, 1865, when they voluntarily separated, and thenceforward lived wholly apart, and, with the exception of one or two casual meetings in that year, never met or saw each other, or had any communication, intercourse, or access of any kind whatsoever; that the Petitioner was born on the 13th of May, 1866; that the marriage was never dissolved by sentence of divorce; nor were they ever judicially separated; that, after leaving her husband, she lived in lodgings until November, 1866, when she went to reside at and manage a public-house (described), and while there became acquainted with *C. R.*, with whom she shortly afterwards, until January, 1876, lived as his wife; that she had, by *C. R.*, three children (born in June, 1868, October, 1870, and December, 1873).

The trustees transferred the fund into Court, and the Petitioner prayed that they might be carried to an account in his name "contingent on his attaining twenty-one," for the payment of costs, and a sum for his maintenance and education.

The Respondents were the three children mentioned above, born after marriage, and the two trustees.

Affidavits had been made by the late wife's husband, among other persons, corroborating the allegations in the petition.

Argument.

Dickinson, Q.C., and *Begg*, for the Petitioner, after stating the facts, proposed to read the affidavit of the husband, and, as authority for so doing, referred to *In re Rideout's Trusts* (1) and *Taylor* on Evidence (2).

W. Pearson, Q.C., and *Hull*, for the three Respondent children:—

We say that the father's evidence cannot be received at all, as the law still is that no evidence of the husband or wife can be adduced which goes to prove non-access between them and to bastardize the issue. The old law, which was founded upon public policy, is clearly stated in *Taylor* on Evidence (3); and though the 32 & 33 Vict. c. 68, had been passed enacting (sect. 3) that "the parties to any proceeding instituted in consequence of adultery,

(1) Law Rep. 10 Eq. 41. (2) Vol. ii. p. 1126.
(3) 6th Ed. vol. i. ss. 92, 168.

and the husbands and wives of such parties, shall be competent to give evidence in such proceeding," that has not altered the law so as to allow a parent to give evidence that a child is illegitimate. The decision in *In re Rideout's Trusts* (1) does not touch the question which has arisen in this case. The true construction of the statute 32 & 33 Vict. c. 68, is that it simply repeals the exceptions in 14 & 15 Vict. c. 99, and 16 & 17 Vict. c. 83. All those statutes are confined to the competency of witnesses; but here the question is one of public policy, and the law remains unaltered that a child born during the existence of a marriage must be protected against such evidence as this. The question is one of principle, and is not affected by the statutes, nor is it affected by the decision in *In re Rideout's Trusts*, as the Court in that case did not determine that the old law had been superseded by the statutes.

HALL, V.C.:—

I am of opinion that I cannot treat the decision in *In re Rideout's Trusts* as bearing the construction which Mr. *Pearson* has contended for. A very important question is raised here, and looking at that case—the arguments, dates, and the affidavits which were read—the learned Judge did not, as I conceive he would have done in express terms, if the old rule had prevailed, exclude those affidavits, but his judgment was clearly to the effect that the law did not exclude a great portion of the evidence of the husband, and, therefore, though I cannot say that the decision in that case altered the law in that respect, yet the learned Judge seems to have considered that the law may have been altered; though, having regard to the old rule, he did not act upon the alteration further than this—that he treated the evidence as admissible, but not to be acted upon unless corroborated by other evidence. Therefore I must admit the evidence of the father.

Dickinson, Q.C., and *Begg*, then read all the affidavits, and contended that the Petitioner was the only legitimate child interested in the fund.

W. Pearson, Q.C., and *Hull*, pointed out that this was a gift by

(1) Law Rep. 10 Eq. 41.

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a father to his daughter's children, and that at the time when he made his will he knew she had several children living.

Stirling, for the trustees.

HALL, V.C.:—

I think it is clear on the terms of this will that the trusts are not for children other than those who are legitimate. The evidence is clear, and having regard to the rule of law in the *Banbury Peerage Case* (1), *Morris* v. *Davies* (2), and *Plowes* v. *Bossey* (3), I hold that the Petitioner is the only child interested in the fund. I do not think it was necessary to make the child born before marriage a Respondent. The fund must be carried to a separate account, and any application as to a sum for maintenance must be made in Chambers. The costs of all parties as between solicitor and client must be paid out of the fund.

Solicitors: *Mackeson, Taylor, & Arnould; Brettell, Smythe, & Brettell.*

(1) 1 S. & S. 153. (2) 5 Cl. & F. 163.
(3) 2 Dr. & Sm. 145.

KEMP *v.* BIRD.

FRY, J.

1877

May 8.

[1876 K. 37.]

Lease—Covenant—Trade—Covenant not to let adjoining Property for the Purpose of a Trade.

B. demised an eating-house for a term of twenty-one years, and covenanted that he would not during the term let any house in the same street "for the purpose of carrying on the business of an eating-house," provided always that the covenant should be binding only on *B.*, and not on his heirs, administrators, or assigns. Subsequently *B.* let the adjoining house for twenty-one years to another person, who covenanted with him not to carry on there any trade or business without *B.'s* license. The first lease was subsequently assigned to *K.*, and the second to *G.* *K.* brought an action against *B.* and *G.* to restrain *G.* from carrying on an eating-house on the premises comprised in the second lease and *B.* from permitting him to do so:—

Held, that the covenant could not be treated as a covenant that none of the houses should during the term be used as an eating-house, and that as *B.* had not let the second house for the purpose of an eating-house the covenant was not broken by *G.*'s carrying on there the business of an eating-house, nor by *B.'s* not interfering with his doing so.

Statement.

THIS was an action for an injunction to restrain the Defendant *Godfrey* from carrying on, and the Defendant *Bird* from permitting him to carry on, in a house, 33, *London Street, Paddington*, the trade or business of an eating-house, ale or beer-shop, or coffee-house.

The Plaintiff was the occupier of the adjoining house, 34, *London Street*, to which he was entitled for the residue of a term of twenty-one years, created by a lease dated the 4th of July, 1870, granted by the Defendant *Bird* to *Elizabeth Fareweather*. The house was at the time of granting the lease used as a coffee-house, and the lease contained a covenant by the lessee not to carry on upon the property any of certain specified trades, or any other noisome or offensive trade other than the business of an eating-house, ale or beer-shop, or coffee-house, and the following covenant on the part of the lessor:—

"That she, the said *E. Fareweather*, her executors, administrators, and assigns, paying the said rent and sum and sums of money hereinbefore reserved, and observing, fulfilling, and keeping the

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several covenants, provisoes, and agreements hereinbefore contained and on her and their part and behalf to be done, observed, fulfilled, and kept according to the true intent and meaning of these presents, shall and lawfully, may peaceably and quietly, have, hold, use, occupy, possess, and enjoy all and singular the premises hereby demised with the appurtenances during all the said term of twenty-one years hereby granted, without any let, suit, denial, molestation, eviction, or interruption of or by him the said *G. Bird*, his heirs or assigns, or any person or persons lawfully or equitably claiming or to claim by, from, or under him, them, or either of them. And further that he, the said *George Bird*, shall not during the said term hereby granted, demise or let any or either of the messuages or tenements now forming the said street called *London Street, Paddington*, between *Arthur Mews* and *Francis Mews*, to any person or persons whomsoever for the purpose of carrying on the trade or business of an eating-house, ale or beer-shop, or coffee-house: Provided always, that the covenant lastly hereinbefore contained shall be binding only on the said *G. Bird*, and not on his heirs, executors, administrators, or assigns."

The premises were assigned to the Plaintiff in 1875 for the residue of the term, and he carried on there the business of a coffee and eating-house.

The Defendant *Bird*, in 1872, demised No. 33, *London Street*, to *Henry Sly*, described in the lease as a butler, for a term of twenty-one years, and the lessee covenanted that he, his executors, administrators, or assigns, would not carry on upon the property any trade or business without the leave of the lessor. This lease was afterwards assigned to the Defendant *Godfrey*.

The Plaintiff by his statement of claim alleged that *Godfrey* was carrying on the business of a coffee-house and eating-house, and ale or beer-shop, or one of such trades, in No. 33; that both *Sly* and *Godfrey* took with notice of the covenants contained in the lease under which the Plaintiff claimed; that *Bird* refused to enforce the covenant in *Godfrey's* lease, and permitted *Godfrey* to continue the business; and the Plaintiff asked for an injunction against the Defendants as above, and for damages against each of them.

Godfrey, by his defence, submitted that the covenant did not bind

him. He moreover denied that he had any notice of the covenants in the Plaintiff's lease when he took the assignment of No. 33, and he denied that he was carrying on any of the trades alleged.

Bird, by his defence, stated that he had when he granted the lease of No. 34 refused to bind himself to anything more than that he would not intentionally let any of the other houses to any one who to his knowledge intended to carry on any of the businesses in question. He stated that he had not let No. 33 for the purpose of any of such businesses, and that *Godfrey* was not carrying on any of them; and he submitted that if *Godfrey* had been so doing the Plaintiff had no right to call upon him, *Bird*, to enforce the covenant in *Godfrey's* lease. The action now came on for trial.

Statement.

Fischer, Q.C., and *Tremlett*, for the Plaintiff:—

Argument.

We submit that the true construction of the covenant in the Plaintiff's lease is that the landlord will not let any adjoining house to any person who shall use the house for the purpose of an eating-house.

[FRY, J.:—Suppose the landlord lets one of the houses, taking a covenant against the tenant's carrying on any trade, does he commit a breach of his covenant with the Plaintiff by not enforcing this restrictive covenant?]

Looking at the object of the parties, we say that he does; the object was through the instrumentality of the landlord to restrain the carrying on of the trade: *Platt* on Covenants (1). *Jay* v. *Richardson* (2) is on all fours with the present case. The words at the end of the covenant cannot reasonably be held to apply to a tenant; they are only introduced to prevent the covenant from extending to persons on whom the freehold devolves by descent, devise, or alienation *inter vivos*. The Defendant *Godfrey* taking with notice is bound by the covenant: *Western* v. *Macdermott* (3); *Cooke* v. *Chilcott* (4).

Stirling, for *Bird*, and *Bagshawe*, Q.C., and *Bunting*, for *Godfrey*, were not called upon.

35 Beav. 243. 12 Jur. N.S. 266

(1) Pages 139, 141.
(2) 30 Beav. 563. 8 Jur. N.S. 689
(3) Law Rep. 1 Eq. 499; Ibid. 2 Ch. 72.
(4) 3 Ch. D. 694.

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FRY, J.:—

I am of opinion that the Plaintiff's case fails. It rests on a covenant contained in a lease, dated the 4th of July, 1870, of a house, No. 34, *London Street*, which covenant the Plaintiff seeks to enforce by way of injunction, and he also claims damages. The lease was made between the Defendant *Bird*, of the one part, and *Elizabeth Fareweather*, of the other part, and by it *Bird* demised to *E. Fareweather*, for a term of twenty-one years, a messuage in *London Street*, then used as an eating-house and coffee-shop:—[His Lordship here stated the above-mentioned covenants by the lessee and the lessor.] In March, 1872, *Bird* demised to *Sly*, described in the lease as a butler, a house, No. 33 in *London Street*, for a term of twenty-one years, and the lease contains a covenant by *Sly* against carrying on any trade or business upon the premises without the license of the lessor. This lease has been assigned to the Defendant *Godfrey* with the consent of *Bird*. Now it strikes one at first sight that a demise of one of these houses to a tenant who covenants not to carry on there any trade or business without the assent of the lessor, cannot possibly be in itself a breach of the covenant which the Plaintiff is seeking to enforce unless it can be shewn that the lease was really granted with the intention that the lessee should carry on one of the prohibited trades, and that the covenant against carrying on a trade was a sham. That, however, is neither alleged nor proved, and it has not been argued that the granting of the lease was a breach of the covenant. What is relied on is that a prohibited business is being carried on in the house, and that *Bird* does not enforce against *Godfrey* the covenant to use it only as a private dwelling-house. Now it must be conceded that this is not any breach of the covenant according to its strict terms, for *Bird* clearly has not let the house to any one for the purpose of carrying on the business. That is admitted, but it is contended that the words of the covenant, if taken strictly, do not express the real meaning of the parties, which was that the house should not be used for carrying on any of the prohibited trades, and that the covenant ought to be construed according to that intention, and as imposing on *Bird* an obligation to enforce the covenant contained in *Sly's* lease. I am of opinion that the covenant in the Plaintiff's lease cannot be so construed.

In the first place, the covenant, as it stands, is intelligible and reasonable—that *Bird* will not grant a lease with a view to the business of a coffee-shop or eating-house being carried on. In the next place, the construction contended for by the Plaintiff creates a much wider obligation than is imported by the strict words of the covenant. As I read it, *Bird* might, without any breach of covenant, have carried on an eating-house himself, or sold one of the houses out and out for the purpose of that business being carried on there. I do not see why I should extend the covenant when, if taken as it stands, it is rational and intelligible.

But the matter does not stop there, for at the end of the covenant is a proviso confining its operation to *Bird* himself. It has been argued that the proviso has not that effect; but I cannot imagine words more apt to express the intention that the covenant should be binding only on *Bird* personally. If it was intended to bind the premises during the term, we should expect to find a covenant purporting to bind all persons into whose hands the premises might come, and the declaration that the covenant should not be binding on *Bird's* heirs, executors, administrators, or assigns, is quite inconsistent with any such intention. I cannot, merely on the ground that this covenant was intended to give some protection to the business of an eating-house carried on upon the premises, stretch it so as to give the lessee something going beyond the terms of his bargain. If what the Plaintiff contends for had been the intention of the parties, nothing could have been simpler than to say that none of the *London Street* houses should during the term be used for the business of a coffee-shop or eating-house, and that would have bound every person who took any of the houses with notice of it. The action must be dismissed with costs.

Solicitors: *Eardley-Holt & Co.; Singleton & Tattershall; Bowker, Peake, & Bird.*

FRY, J.

1877

May 7, 12.

BUTLER *v.* BUTLER.

[1875 B. 17.]

Breach of Trust—Liability of co-Trustee—Sale—Deficiency.

Two trustees advanced to a builder money on mortgage of land and houses thereon. The land had belonged to the Defendant, one of the trustees, and part of the money advanced was applied by the builder in payment of the price of the land and of other money due by him to the Defendant. The other trustee filed a bill against the Defendant, alleging that the security was insufficient, and asking that the security should be realized, and that the Defendant should make good any deficiency:—

Held, that under such circumstances one trustee had no equity to make the other trustee primarily liable: and

Held, that the Court would not direct a sale in the absence of the *cestuis que trust*, and merely to ascertain the deficiency, if any.

Statement.

JOHN BUTLER, *Walter Butler*, and *Jane Sarah Butler* were the trustees and executors of the will of *John Butler*, deceased, and as such held a considerable sum of New £3 per Cent. Annuities in trust for the testator's children and grandchildren.

Walter Butler owned land near *Croydon*, and agreed to sell part of it to one *Arnold*, a builder. The trustees advanced to *Arnold*, to a person named *Fennell* (who was connected with *Arnold*), and to another person named *Steed*, out of the trust money sums amounting to £5850 on mortgages of the land formerly belonging to *Walter Butler* and the houses built thereon by *Arnold*, *Fennell*, and *Steed*. A large part of this money appeared to have been received from *Arnold* by *Walter Butler* in payment of the purchase-money for the land and of other money due by *Arnold* to *Walter Butler*, as stated in the judgment. *Arnold* had presented his petition for liquidation.

John Butler, in January, 1875, filed a bill against *Walter Butler* and *George Huntley*, who had been appointed a trustee in the place of *Jane Sarah Butler*, stating that *John Butler*, the Plaintiff, was wholly ignorant of the business relations between *Walter Butler* and *Arnold*; that *John Butler* was induced by the solicitation of *Walter Butler* to make the advances, and only agreed to an advance on condition that *Walter Butler* should be personally liable for repayment; that the mortgaged houses were not nearly

Statement.

a sufficient security for the money advanced; and that, in 1871, when *John Butler* urged *Walter Butler* to allow the money to be called in, a larger sum could have been realized. And the bill prayed that the mortgage securities might be realized, and that *Walter Butler* might be decreed to make good to the estate of the testator, if necessary, the principal money and interest due on the mortgages.

The Defendant *Walter Butler*, who was a solicitor, denied that he had given any guarantee; and alleged that the Plaintiff *John Butler* was well aware of the business relations between the Defendant and *Arnold;* that the Plaintiff was a solicitor, and was well aware of the value of property at *Croydon;* and the Defendant denied that the property mortgaged was an insufficient security.

Evidence was given by affidavit and *vivâ voce* in Court, the effect of which is stated in the judgment. There was some evidence of an agreement by the Defendant *Walter Butler* to guarantee the payment of the interest on the mortgage whilst subsisting.

Argument.

J. H. Palmer, Q.C., and *Nugent*, for the Plaintiff:—

Whenever one trustee obtains a benefit by the advance of the trust money there arises an equity between the trustees, and he must be primarily liable to make good any loss. That principle was acted upon by the Vice-Chancellor *Malins* in *Stone* v. *Bennett* (April 27th, 1876). The trustee who has received the benefit surely ought to bear the loss. The Plaintiff was induced to concur in this advance by the advice of the Defendant on a positive guarantee.

Bristowe, Q.C., and *W. W. Cooper*, for the Defendant *Walter Butler*.

Mackeson, Q.C., for the other trustee.

J. H. Palmer, in reply.

Judgment.

May 12. FRY, J., after stating the object of the bill and the position of the parties, continued:—

It is alleged by the Plaintiff and admitted by the Defendant,

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that the advances are not such as could be justified as against the *cestuis que trust*, and, consequently, that if the securities should prove inadequate, the *cestuis que trust* may have a claim against these two trustees; and the object of the bill is to maintain that as between them the Defendant *Walter Butler* is liable to indemnify the Plaintiff. The claim is placed on two grounds: First, express agreement; and, secondly, an implied contract or obligation resulting in law or in equity from the facts. [His Lordship then stated the facts with regard to the first point, and came to the conclusion that as to any express agreement to indemnify the case of the Plaintiff had failed. His Lordship then continued:—]

The case, as regards a legal or equitable liability on the part of the Defendant to indemnify the Plaintiff, rests upon these facts. Of £5850 advanced on the mortgages in question, and on *Steed's* mortgage, £4858 14*s.* 6*d.* found its way to the Defendant *Walter Butler*; as to £1250 of it, in payment of the purchase-money for the land; as to further part in repayment of advances made by *Walter Butler* to *Arnold* to assist him in building the houses; and as to the residue, in or towards satisfaction of other sums of money due by *Arnold* to *Walter Butler*.

It is admitted that the Plaintiff knew that part of these mortgage-moneys to be advanced by the trustees would go to *Walter Butler* in payment of the purchase-money of the land, but it is said that he knew nothing of the other sums of money due from *Arnold* to *Walter Butler*. The Plaintiff knew that the Defendant would derive a benefit from the mortgage, but the extent of the benefit he did not know and did not inquire into. Furthermore, the Plaintiff knew that the land on which the money was to be advanced was the Defendant's; that *Arnold* was a builder; that *Arnold* was the Defendant's client; that *Arnold* had erected buildings on the Defendant's land; and that other transactions or negotiations existed between the Defendant and *Arnold*. It has not been argued that the Plaintiff is an innocent trustee, and if such an argument had been adduced I do not think that it could have succeeded. The proposition on which the Plaintiff's counsel have relied, is that wherever an advance is made by two trustees which constitutes a breach of trust, and one trustee derives an indirect benefit from the money advanced, such trustee is under a personal

liability to indemnify the other trustee for the whole amount, or at least that this is the case, where the one trustee does not know the full extent of the indirect benefit received by the other.

In support of this proposition I asked, but asked in vain, for authority, and Mr. *Palmer* only referred to an unreported case of *Stone* v. *Bennett*, before Vice-Chancellor *Malins*, which, according to his statement of it, did not appear to me relevant.

On principle, I have great difficulty in acceding to the proposition. Where there is innocence on the one side and guilt on the other, or even where there is knowledge on the one side and ignorance on the other, I can see a reason for attributing a primary liability to the one trustee and a secondary liability to the other; but I see no such reason in a case where both trustees are fully cognizant of the breach of trust, and intend the breach of trust to enure partially to the benefit of one of them, simply because one trustee derives a larger indirect benefit from the trust money advanced than the other trustee anticipated. To what extent is such a doctrine to be carried? How small a benefit will create this liability to indemnify for the whole amount of the fund? Through how large a circuit may the money travel to the recipient trustee, and yet create a liability on his part to his co-trustee?

The case of *Raby* v. *Ridehalgh* (1) shews that the receipt by a *cestui que trust* of benefits from a breach of trust which he induced the trustees to commit, does not create a personal liability in the *cestui que trust* to indemnify the trustee; and I am at a loss to see why a receipt of benefits by one trustee should create such a liability towards the other.

For this is not, it must be observed, an attempt to make one trustee primarily liable to the extent of the trust moneys reaching his hands, but an assertion of a personal liability to indemnify. No argument has been addressed to me in favour of a more limited right of indemnity; and considering that the moneys which did reach *Walter Butler's* hands came thither for valuable consideration, that he has parted with his land for a portion of the money, and took the rest in extinction of his right to sue for debts, I doubt whether, as between *Walter Butler* and the Plaintiff, his co-trustee, who allowed the money to be paid to *Arnold*, the Plain-

(1) 7 D. M. & G. 104.

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tiff could ever say that the money in *Arnold's* hands was still subject to the trusts of the testator's will. That point, however, has not been raised, and does not now require decision.

But assume that there is an obligation on the Defendant to indemnify the Plaintiff against all damage or loss accruing to the Plaintiff from the loans, or even against all claims and demands made on the Plaintiff in respect of them. Even then it must be remembered that as yet no damage or loss has accrued to the Plaintiff—no claim or demand has been made against him by the *cestuis que trust*. As a general rule, I conceive that an indemnified person cannot sue his indemnifier until the loss has arisen against which the indemnity was given. To allow every person entitled to an indemnity under given circumstances to bring an action *quia timet* before the right to indemnity exists, would, in my opinion, be a most mischievous enlargement of the jurisdiction of the Courts.

But, again, how does the Plaintiff ask me to give effect to the indemnity? The first and essential step is the realization of the securities in order to ascertain the amount of liability. This realization the Plaintiff seeks by sale, for the mortgagor having become bankrupt his covenant is valueless or nearly so; and foreclosure would not answer the Plaintiff's object, which is to ascertain the *quantum* of liability. This order for sale I am asked to make in the absence of the *cestuis que trust* to whom this money belongs. For aught that appears, they are capable of electing to take or to reject the securities. They may desire to retain them or to realize them by foreclosure, or they may desire to hold the Defendant *Walter Butler* to any guarantee which he may have given. Of all these rights I am asked to deprive the *cestuis que trust*, behind their backs, in order that a guilty trustee (I mean a trustee who has been guilty of a breach of trust) may assert a primary liability in his co-trustee, in respect of a loss not realized, and of a demand not made, and may ascertain the measure of this liability.

I can do nothing of the sort. The Plaintiff has, in my opinion, misconceived his rights, and I dismiss his bill with costs.

Solicitors for Plaintiff: *Randall & Angier*, agents for *J. M. Head*, *Reigate*.

Solicitor for Defendant: *E. P. M. Saffery*.

In re TRETHOWAN. *Ex parte* TWEEDY.

C. J. B.
1877
Jan. 15, 22.

Equitable Mortgage of Leaseholds—Deposit of Title Deeds without Memorandum—Trade Fixtures—Bankruptcy of Mortgagor—Rights of Trustee—Possession—Bills of Sale Act, 1854 (17 & 18 *Vict. c.* 36)—*Order and Disposition.*

The lease of a shipbuilding yard and the trade fixtures therein were assigned to a shipbuilder, to hold the leasehold premises for the residue of the term granted by the lease, and to hold the trade fixtures absolutely. He deposited the lease and the assignment with his bankers as security for advances made by them to him. No memorandum of charge was executed. The mortgagor afterwards filed a liquidation petition. The bankers had not taken any possession of the trade fixtures:—

Held, that, as against the trustee in the liquidation, the bankers had no title to the trade fixtures.

Statement.

THIS was an appeal from a decision of the Judge of the *Truro* County Court.

By an indenture dated the 6th of November, 1815, Lord *Clinton* demised to *R. L. Symons*, his executors, administrators, and assigns, several pieces of land situate in *Little Falmouth*, and adjoining each other, and three messuages and other buildings erected on different parts of the said lands, together with all buildings, slips, quays, wharves, cranes, and other appurtenances to the demised premises belonging (except and always reserved unto the lessor, his heirs and assigns, certain tolls as lord of the manor of *Tregew* in respect of the anchoring, grounding, ballasting, loading or unloading of any ships, vessels, boats, or other sea craft upon the sea beach adjoining the demised premises), To have and to hold the demised premises unto *Symons*, his executors, administrators, and assigns, for the term of 999 years from the 24th of June, 1813, at the yearly rent of £59 14*s.*, and subject to the covenants therein contained. There was a covenant by *Symons* that he, his executors, administrators, or assigns, would, before the expiration of the first eleven years of the term, expend the sum of £4000 in making and erecting good and substantial buildings and other improvements necessary for the carrying on the business of a shipbuilder thereon, and would, during the term, keep the said messuages and buildings, or any other buildings to be

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erected in lieu thereof, in good repair, and also would, during the term, repair, maintain, and keep the wharves, quays, docks, slips, and other appurtenances to the demised premises belonging. There was a further covenant by *Symons* that he, his executors, administrators, or assigns, would not assign, demise, or underlet all or any part of the demised premises for all or any part of the term without the previous license in writing of the lessor, his heirs or assigns, or unless any such disposition should be by last will; and that the lessee, his executors, administrators, or assigns, or sub-lessees (as the case might be), or donees, in the event of a gift by will, would, upon every such license to alien or otherwise dispose of or underlet being granted, or upon any disposition by will (as the case might be) pay to the lessor, his heirs or assigns, one-tenth part of the consideration for which such alienation or other disposition or underlease should be made, or if the same should not be for a full valuable consideration, or should be by will, then that the lessee, his executors, administrators, or assigns, or sub-lessees, or donees (as the case might be), should pay to the lessor, his heirs or assigns, one-tenth part of the actual improved value of his or their estate and interest to be acquired in the demised premises by such alienation or other disposition as aforesaid.

Symons, after the grant of this lease, duly laid out the £4000 in fulfilment of the covenant on his part so to do. The demised premises were bequeathed by him to his son *Thomas Symons*, by whom they were bequeathed to *John Carlyon*, the executor and trustee of his will.

On the 3rd of October, 1865, an indenture was executed between *Carlyon* of the one part, and *H. S. Trethowan* of the other part. It contained a recital that *Carlyon* had contracted with *Trethowan* for the absolute sale to him, first, of the leasehold hereditaments thereinafter described (being part of the premises comprised in the lease of the 6th of November, 1815), subject as thereinafter mentioned, at the price of £2000; and, secondly, of the machinery and other trade fixtures and appliances, then on the same hereditaments and premises, at the price of £500. And it was thereby witnessed that in pursuance of the said agreement, and in consideration of the sum of £2500 paid by *Trethowan*, *Carlyon*

did thereby assign to *Trethowan*, his executors, administrators, and assigns, firstly, the leasehold premises therein described, with their appurtenances, and, secondly, all, every, and singular the machinery and other trade fixtures and appliances then on the same premises, to have and to hold the leasehold premises, with their appurtenances, to *Trethowan*, his executors, administrators, and assigns, from the 24th of June then last for the residue then unexpired of the term of 999 years (subject to the payment of the rent reserved by the lease, and to the performance of the covenants therein contained), and to have and to hold the machinery and other trade fixtures and appliances thereby assigned to *Trethowan*, his executors, administrators, and assigns, to and for his and their own absolute use and benefit.

On the occasion of this assignment being made the lessor gave his license in writing, and the sum of £200 was paid to him, being one-tenth part of the consideration of the £2000 paid for the assignment of the leasehold premises. *Trethowan* carried on the business of a shipbuilder on the premises. A considerable part of the £2500 was advanced to him by his bankers, Messrs. *Tweedy, Williams, & Co.*, and shortly after the purchase was completed he deposited with them the two indentures of lease and assignment. No memorandum of charge was executed.

On the 28th of July, 1876, *Trethowan* filed a liquidation petition. The bankers had done nothing to take possession of the machinery or fixtures. The creditors resolved upon a liquidation by arrangement, and appointed *R. Fox* and *E. Handcock* trustees. At the commencement of the liquidation the debtor owed the bankers, upon the balance of his current account, more than £10,000. The bankers claimed to hold the deeds as a security for the whole of this amount. But, according to the debtor's evidence, the deposit was intended to secure only the sum actually due from him to the bankers at the time when it was made. The bankers, moreover, claimed to be entitled to a security, not only on the leasehold premises, but also upon the machinery and trade fixtures. The bankers deposed that since the deposit of the deeds with them, *Trethowan* had laid out about £5000 in erecting additional sheds, trade fixtures, and other appliances for the purpose of better enabling him to carry on his trade. *Trethowan* made an

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affidavit on behalf of the trustees, in which he stated that in the latter part of the year 1874 and the early part of 1875 he erected on the premises for trade purposes a saw-mill shed, with an engine and machinery. The machinery cost £1600, and the shed cost about £1000.

The trustees claimed the machinery and trade fixtures, and the Judge decided that they were entitled to them. The bankers appealed.

Argument.

Yate Lee, and *Tweedy*, for the Appellants:—

The County Court Judge held that the fixtures were not included in the mortgage, because no memorandum of charge was executed. The decision of the House of Lords in *Meux* v. *Jacobs* (1) shews that he was wrong, and that fixtures pass by a mortgage of leaseholds, just as they would by a mortgage of freeholds, without being expressly named. It makes no difference that, as between landlord and tenant, the latter would have a right to remove the fixtures during the term: *Longbottom* v. *Berry* (2). The *Bills of Sale Act* has no application where there is no assignment of fixtures as a distinct and separate subject-matter, but where they pass merely as incident to the land, to be used with it for the term. There is nothing in such a case which can be registered. The bankers are entitled to a general lien, even if the deposit was originally made for a particular purpose, unless there is anything in the agreement inconsistent with the existence of a general lien: *Jones* v. *Peppercorne* (3).

De Gex, Q.C., and *Ingle Joyce*, for the trustees:—

There is a great difference between the effect of a mortgage by a freeholder and that of a mortgage by a leaseholder. In *Longbottom* v. *Berry* the mortgage was made by the owner of the fee. Neither in that case nor in *Meux* v. *Jacobs* had the mortgagee become bankrupt. In *Meux* v. *Jacobs* the question was merely one of priority between two mortgagees, and the *Bills of Sale Act* could have no possible application. Moreover, the memorandum of charge shewed that the fixtures were intended to be included. In

(1) Law Rep. 7 H. L. 481. (2) Law Rep. 5 Q. B. 123.
(3) Joh. 430. 5 Jur. N. S. 140

the present case there is nothing but a deposit of the title-deeds; there is nothing to shew any intention that the fixtures should be charged. The law applicable to the case is laid down in *Ex parte Daglish* (1). In that case *Mellish*, L.J., agreed with the dissent which *Malins*, V.C., in *Begbie* v. *Fenwick* (2), and *Blackburn*, J., and *Mellor*, J., in *Hawtry* v. *Butlin* (3), expressed from the decision of *Wood*, V.C., in *Boyd* v. *Shorrock* (4), and *Mellish*, L.J., said (5): "In my opinion, the true construction of that Act [the *Bills of Sale Act*] is, that, if a person is in possession of fixtures, then he cannot pledge those fixtures so as to give a title to the mortgagee, except by an instrument which is to be registered as a bill of sale." *Mather* v. *Fraser* (6) and *Climie* v. *Wood* (7) were cases of mortgages by owners in fee. In the present case the principal value of the property consists in the trade fixtures and machinery, to which of course the creditors who trusted the debtor looked as part of his assets. Something ought to be done to inform the creditors of the change of ownership. The reputed ownership clause was felt to be defective, because it had been held not to extend to fixtures. The object of the *Bills of Sale Act* was to supplement that clause and to cure the defect, and for the purposes of the Act fixtures are by sect. 7 made "personal chattels." Can the Act be evaded by a man taking an absolute assignment to himself of trade fixtures, and then depositing the assignment with his bankers without any memorandum of charge, whereas, if there had been a memorandum, it must clearly have been registered to give it validity as against the trustee in bankruptcy of the mortgagor? The principle of the decisions in *Smale* v. *Burr* (8) and *Ramsden* v. *Lupton* (9) does not apply, for in both those cases the grantee had acquired a legal title to the goods. The present is the first case in which a mortgagee of fixtures has claimed them without any legal title. The decision in *Russel* v. *Russel* (10), that a mere deposit of deeds constitutes an equitable mortgage, has stood too long to be questioned, though its correctness has been often doubted; but the Court is now asked to carry the principle further than it has ever

(1) Law Rep. 8 Ch. 1072.
(2) Ibid. 1075, n.
(3) Ibid. 8 Q. B. 290.
(4) Ibid. 5 Eq. 72.
(5) Ibid. 8 Ch. 1083.
(6) 2 K. & J. 536.
(7) Law Rep. 3 Ex. 257.
(8) Ibid. 8 C. P. 64.
(9) Ibid. 9 Q. B. 17.
(10) 1 Bro. C. C. 269.

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yet been carried. Would the Court direct a bill of sale of the fixtures to be given in direct contravention of the *Bills of Sale Act?* When machinery attached to land is dealt with as a distinct subject-matter, the instrument assigning it is a bill of sale: *Waterfall* v. *Penistone* (1). The deed of assignment in the present case is equivalent to two distinct deeds, one assigning the lease, the other assigning the fixtures. The bankers take whatever interest they do take in the fixtures by means of a deposit with them of the assignment to the debtor. If a mortgage had been executed they would have been entitled to a separate assignment of the fixtures. At any rate, they are entitled only to the fixtures which existed at the date of the assignment, not to those which have been put up since. And their security can extend only to the money which was advanced at that time, not to subsequent advances, there being nothing to shew that the subsequent advances were made on the faith of the security: *Ex parte Langston* (2); *Ex parte Whitbread* (3).

Yate Lee, in reply:—

Meux v. *Jacobs* (4) is clearly in our favour, and in *Williams* v. *Evans* (5) it was held that a mere deposit of a lease by way of mortgage carried the right to the fixtures. *Ex parte Barclay* (6) is also in our favour. And, according to *Ex parte Barclay* (7), where a mortgage of leaseholds makes no distinction between the land and the trade fixtures, and gives the mortgagee no power to sever the fixtures, it need not be registered under the *Bills of Sale Act*. The mere deposit of the lease and assignment did not give the bankers power to sever the fixtures, any more than it gave them power to pull down the buildings and sell the bricks.

Judgment.

BACON, C.J.:—

No one can say that this case has been argued at greater length than is necessary as regards either its facts or the importance of the general law.

(1) 6 E. & B. 876. (4) Law Rep. 7 H. L. 481.
(2) 17 Ves. 227. (5) 23 Beav. 239.
(3) 19 Ves. 209. (6) 5 D. M. & G. 403.
(7) Law Rep. 9 Ch. 576.

The facts are simple, and can hardly be said to be in controversy. The debtor became the owner of some shipbuilding premises which were assigned to him by a deed the provisions of which have been stated. By that deed the interest of the lessee in the lease was assigned in proper form, and his interest in the chattels was assigned in a different form; the two things are purposely kept wholly distinct for obvious reasons, one of which was this, that the landlord was entitled to a fine or fee upon the assignment of his property, but was entitled to claim nothing in respect of the increased value which the premises might have acquired by the addition of fixtures. It cannot be disputed that the two things were kept wholly distinct and separate.

Then, matters so standing, the purchaser under that assignment wants some assistance from his bankers, and he obtains it by the deposit of the title-deeds. I cannot doubt that that gave to the bankers a general lien. Nothing was said upon the subject, and it was not necessary that anything should be said, still less that anything should be written, in order to constitute a valid equitable assignment. Upon the facts before me, I cannot doubt that the intention was this, that all the value which the debtor had acquired by means of his purchase should be mortgaged to the bankers to secure the money which they advanced him, and that they had a general lien upon the deeds deposited with them like any other security. I do not doubt that they had a good mortgage for all that.

Then comes the question to which the bankrupt law is applicable, namely, whether by reason of there having been (as is admitted) no registration under the *Bills of Sale Act*, or for any other reason, these chattels which are the subject of the learned Judge's order, viz., the trade fixtures, pass to the mortgagees, or whether they are the property of the trustees in the liquidation. Now, after *Ex parte Daglish* (1), it is clear that where there is a perfectly separate transaction, where it is possible and necessary to separate the chattels from the substantial property, there, unless there is a registered bill of sale, the mortgagee cannot claim the chattels as against the trustee.

Mr. *Yate Lee* has argued that, inasmuch as in the present case there was nothing to register, there could be no registration

(1) Law Rep. 8 Ch. 1072.

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effected, and that, therefore, the *Bills of Sale Act* can have no application. I am afraid that in avoiding *Scylla* he runs into *Charybdis*, because, if his argument is to prevail, there was an absolute assignment of the fixtures to the bankers. The bankers were the true owners of them, and beyond all doubt they left the debtor in possession of them, and he was in possession of them with their full consent. They were in his reputed ownership, and in his order and disposition, with the consent of the true owners, even if the argument were to prevail that, there being no memorandum to register, the *Bills of Sale Act* has no application. But, in my opinion, the *Bills of Sale Act* has a perfect application. Not forgetting *Meux* v. *Jacobs* (1), or the law which was clearly pronounced in *Ex parte Daglish* (2), it is quite certain that there could be no transfer by deposit of title-deeds only of the fixtures which are the subject of this inquiry. *Meux* v. *Jacobs* has nothing in the world to do with the present case. In *Meux* v. *Jacobs* the question was between two mortgagees. There was no question about order and disposition, or registration of the bill of sale. There had been some confusion as to that before the Master of the Rolls, but in the House of Lords it was removed. It was a question of priority. The question was raised whether the fixtures were included in the first mortgage, and that question was decided very plainly. Among other things, there was a covenant in the deed for the payment by the mortgagor of the premiums for insurance of the mortgaged property, including the fixtures, and there could be no doubt that in point of law they were included in the mortgage. That has nothing on earth to do with the present case. The question here is, whether a mortgage by deposit of the title-deeds of leasehold property passes to the mortgagee the right to the trade fixtures. If it did, then, as was pointed out in *Ex parte Barclay* (3), the mortgagee would have a right to enter and take them at any time he pleased if it was an absolute assignment. The distinction pointed out in *Hawtry* v. *Butlin* (4) between a mortgage by a leaseholder and a mortgage by a freeholder, where the decision of Vice-Chancellor *Wood* in *Boyd* v. *Shorrock* (5) was disapproved, and that of Vice-Chancellor *Malins*, in *Begbie* v. *Fenwick* (6),

(1) Law Rep. 7 H. L. 481.
(2) Ibid. 8 Ch. 1072.
(3) Ibid. 9 Ch. 576.
(4) Law Rep. 8 Q. B. 290.
(5) Ibid. 5 Eq. 72.
(6) Ibid. 8 Ch. 1075, n.

was adopted, in my judgment, leaves the matter clear upon the law. Without a positive treaty or contract for the assignment of the chattels, in my opinion they would not pass. If they had been assigned by a written instrument, then the necessity for registration of that instrument would at once have presented itself, not for the purpose of defeating the title of the mortgagees, but for the purpose of establishing their title as against the trustee in bankruptcy of the mortgagor. The trustees have a right to say that when the liquidation happened the debtor was in possession of these fixtures. There was no assignment made of his interest in them to the bankers. I need not refer to the policy of the *Bills of Sale Act*. It is obviously intended to prevent men from getting credit by the apparent ownership of property to which some one else has a better title. That there was a good mortgage to the bankers of all that the bankrupt had purchased for his £2000, I do not doubt at all. The lessee was under a covenant to erect buildings, which covenant, it seems, has been performed. That only added to the value of the property and to the value of the landlord's security, and that passed to the mortgagees. The learned Judge seems to have kept that carefully in view in the order which he has made. He has directed an inquiry as to what are trade fixtures, and he has declared that they belong to the debtor's estate. I am of opinion that that order cannot be disturbed. I cannot touch upon any question of morals, but, upon the plain principles of the administration of the law in bankruptcy, I am of opinion that the trade fixtures existing at the time of the liquidation were in the order and disposition of the debtor with the consent of the bankers, if they were the true owners; and I think, further, that, in order to perfect the title of the bankers, there ought to have been a registered assignment of the fixtures to them, and if they dispensed with that, they did it at the risk of not being able to establish their security upon the trade fixtures. No one can doubt that at any moment, from the time the deposit was made down to the day when the liquidation petition was filed, the debtor, if he had thought fit, might have called in a purchaser, might have sold the steam-engines and everything else that was moveable and capable of being transferred, and neither the mortgagees nor any one else could have interfered with the purchaser from him. I think the order appealed from was perfectly right.

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It may be a difficult matter, with which the Registrar will have to deal, to ascertain what are, properly speaking, trade fixtures, things which a tenant might remove during his tenancy, and what are so annexed to the freehold that the landlord can prevent their removal. That is a question of fact which I have not now to dispose of. The appeal fails, and it must be dismissed with costs (1).

Solicitors for Appellants: *Bolton, Robbins, & Busk*, agents for *Genn & Nalder, Falmouth.*

Solicitors for Trustees: *Gregory, Rowcliffes, & Co.*, agents for *W. Jenkins, Falmouth.*

(1) The bankers appealed from this decision, and from another decision of the Chief Judge with regard to a yacht which had, on the 14th of June, 1876, been assigned by *Trethowan* to the bankers at the agreed value of £300, in part satisfaction of the debt of £10,918 then due from him to them. The trustees claimed the yacht as having been at the date of the filing of the liquidation petition in the order and disposition of *Trethowan* as reputed owner, with the consent of the bankers. The County Court Judge decided this point in favour of the bankers; the Chief Judge reversed his decision, and held that the trustees were entitled to the yacht, and he ordered that the bankers should pay the trustees' costs of their appeal from the County Court.

When the appeal first came on for hearing the trustees raised the preliminary objection that it had been brought too late, and it was then ordered that the hearing should be postponed to enable the trustees to answer an affidavit which the bankers had filed upon the question of time.

The appeal was placed in the paper again for hearing on the 3rd of May, 1877. It was then stated to the Court that an agreement of compromise had been entered into between the bankers and the trustees, for which the trustees asked the approval of the Court. This approval was necessary, because no committee of inspection had been appointed by the creditors. Upon an affidavit by the trustees that the proposed compromise would be very beneficial to the estate, the Court approved of it, and directed that it should be carried into effect.

The terms of the compromise were these: The bankers were to pay £600 to the trustees. The trustees were to assign all the trade fixtures and machinery, and all the chattels and things, fixed or moveable, in or upon the premises, and also the yacht, to the bankers, absolutely discharged from all equity of redemption, and also to assign the lease to the bankers absolutely discharged from all equity of redemption. All further proceedings under the order of the County Court were to be stayed, and, notwithstanding the order of the Chief Judge, each party was to bear his own costs of the appeal to the Chief Judge and of the appeal to the Court of Appeal.

NORTH BRITISH AND MERCANTILE INSURANCE COMPANY *v.* LONDON, LIVERPOOL, AND GLOBE INSURANCE COMPANY.

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[1874 N. 60.]

Insurance—Loss by Fire—Wharfingers' Policies—Merchants' Policies—Condition as to Double Insurance—Contribution.

By floating policies of insurance effected by *B. & Co.*, wharfingers, they insured against loss or damage by fire, in the sums named, grain and seed, the assured's own or on commission, for which they were responsible, subject to conditions of average, and to this condition, that "if at the time of any loss or damage by fire happening to any property hereby insured, there be any other subsisting insurance or insurances, whether effected by the insured or by any other person, covering the same property, the company shall not be liable to pay or contribute more than its rateable proportion of such loss or damage." While these policies were subsisting a fire destroyed a quantity of grain stored with *B. & Co.*, part of which belonged to *R. & Co.*, who had also effected policies, called merchants' policies, on the grain thus destroyed, including also grain stored elsewhere, which policies contained the like conditions as the wharfingers' policies. *B. & Co.* were paid in full by the several insurance companies. In a suit to determine the liability of the companies *inter se*:—

Held (affirming the decision of the Master of the Rolls), that the grantors of the merchants' policies were not liable to contribute to the loss; that *B. & Co.* were primarily liable, but, being indemnified by the grantors of the wharfingers' policies, the latter were ultimately liable:

Held, also, that the condition as to double insurance only applied to cases where the same property was the subject-matter of insurance, and where the interests were the same.

Statement

THIS suit was instituted for the purpose of ascertaining the liability of certain fire insurance companies under policies granted by them in respect of the loss by fire of a large amount of grain and seed belonging to Messrs. *Rodocanachi & Co.*, merchants, and stored in the granaries of Messrs. *Barnett & Co.*, wharfingers, at *Rotherhithe*.

The policies under which the questions in the suit arose were described, for the sake of convenience, as the "wharfingers' policies," being those effected by *Barnett & Co.*, and the "merchants' policies," being those effected by *Rodocanachi & Co.*

The wharfingers' policies were floating policies effected by

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Barnett & Co. with several offices in order to cover the loss of grain in their granaries, or under their care, to the amount of £150,000. One of these policies effected with the *North British and Mercantile Insurance Company* provided as follows:—

"That Messrs. *W. D. Barnett & Co.*, hereinafter called 'the insured,' having paid to the *North British and Mercantile Insurance Company*, hereinafter called 'the company,' the sum of £7 17*s.* 6*d.* for insuring against loss or damage by fire, as hereinafter mentioned, the property hereinafter described, in the several sums following, namely, £4500 on grain and seed, flour and oil-cake (not including rice), the assured's own, in trust, or on commission, for which they are responsible (in no case to exceed the market value of the same immediately anterior to the fire), in the *King and Queen Granaries, Rotherhithe.* . . .

"Subject to the following conditions of average:—

"(1.) It is hereby agreed and declared, that whenever a sum insured is declared to be subject to the conditions of average, if the property so covered shall at the breaking out of any fire be collectively of a greater value than the sum insured thereon, then this company shall pay or make good such a proportion of the loss or damage as the sum so insured shall bear to the whole value of the said property at the time when such fire shall first happen.

"(2.) But it is at the same time declared and agreed that if any property included in such average shall, at the breaking out of any fire, be insured by any other policy in this or any other office, whether subject to average or not, which shall apply to part only of the buildings or places or of the property to which such average extends, then this policy shall not cover the same except only as regards any excess of value beyond the amount of such more specific insurance, which said excess is declared to be under the protection of this policy and subject to average as aforesaid.

"(3.) And it is further declared and agreed, that if the assured shall claim under this policy for loss or damage to property embraced in the terms of any average policy, extending as well to other buildings or places or to other property not included in the terms of this insurance, and if at the breaking out of any fire there shall not be any property in such other buildings or places, or any such other property actually at risk to be protected by

such policy, then, so far as regards the settlement of any claim under this policy, the terms and liability thereof shall be held to be concurrent in all respects with those of such other policy.

"The company hereby agrees with the insured (but subject to the conditions on the back hereof, which are to be taken as part of this policy), that if the property above described, or any part thereof, shall be destroyed or damaged by fire at any time between the 25th day of December, 1870, and 4 o'clock in the afternoon of the 25th day of December, 1876, at which hour this policy will expire, the company will . . . pay or make good all such loss or damage to an amount not exceeding, in respect of the several matters above specified, the sum set opposite thereto respectively, and not exceeding in the whole the sum mentioned."

The material conditions on the back of the policy were as follows:—

"9. If, at the time of any loss or damage by fire happening to any property hereby insured, there be any other subsisting insurance or insurances, whether effected by the insured or by any other person, covering the same property, this company shall not be liable to pay or contribute more than its rateable proportion of such loss or damage.

"10. In all cases where any other subsisting insurance or insurances, whether effected by the insured or by any other person, covering any other property hereby insured, either exclusively or together with any other property in and subject to the same risk only, shall be subject to average, the insurance on such property under this policy shall be subject to average in like manner."

The other policies effected by *Barnett & Co.* with the *Liverpool, London,* and *Globe* and other companies, contained similar provisions to the foregoing.

The merchants' policies were effected by *Rodocanachi & Co.* for the insurance of the grain stored in the said granaries, and also that stored in another granary belonging to *Barnett & Co.* One of these policies, effected with the *North British and Mercantile Company* for £30,000, contained similar conditions to those in the wharfingers' policy before stated; the other, effected with the *Royal Insurance Company,* was also similar, with this exception,

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that it contained no provision to the same effect as condition 10 on the back of the before-mentioned policy.

The total value of the grain and seed destroyed by the fire in the granaries at *Rotherhithe*, which took place on the 14th of December, 1871, was £127,459. The proportion of the grain thus destroyed belonging to *Rodocanachi & Co.* was estimated at £41,480.

By the custom of the trade *Barnett & Co.* were responsible to their customers for the safe custody of the goods in their granaries, and were liable to make good the loss by fire in whatever way it occurred.

It being admitted that the several insurance offices, or some or one of them, were ultimately liable to pay *Barnett & Co.* and *Rodocanachi & Co.* the full amount of their losses according to the "independent liability principle," they contributed to a common fund for that purpose, the amount of which, together with a further amount received for salvage, was paid to *Barnett & Co.* in satisfaction of all claims under their policies, and *Barnett & Co.* paid thereout to *Rodocanachi & Co.* the amount of their loss.

The bill, which was filed by the *North British and Mercantile Insurance Company* as grantors of one of the merchants' policies, alleged that they were under no liability in respect of such policy on the ground that *Barnett & Co.* must be taken to have indemnified *Rodocanachi & Co.* in full for the loss of their grain; and that, even if they were bound to pay to *Rodocanachi & Co.* in the first instance the amount of their loss, they would become entitled to the benefit of all rights of action against *Barnett & Co.* in respect of such loss, and thus to recover from *Barnett & Co.* all that they might pay to *Rodocanachi & Co.* Thus, according to the Plaintiffs' contention, on either view of the case, they were under no ultimate liability to contribute to the common fund. The Plaintiffs further submitted that, as the merchants' policies included other buildings than the one the contents of which were insured under the wharfingers' policies, the latter were specific insurances within the meaning of the condition of average, and, therefore, that the merchants' policies were only liable to contribute to the excess (if any) of the actual loss over the amount secured by the wharfingers' policies, upon the principle that the more extensive policy pays last.

Statement.

The Plaintiffs prayed that the ultimate liability of the several offices to contribute towards the loss might be ascertained and declared.

The *Royal Insurance Company* put in their answer, raising substantially the same contention as the Plaintiffs.

The *London, Liverpool, and Globe Insurance Company*, and the other companies in the same interest, as grantors of the wharfingers' policies, put in a joint answer, submitting that no liability under these policies had arisen, inasmuch as they only effected a counter-indemnity to *Barnett & Co.* to cover their liability to indemnify *Rodocanachi & Co.*, and that the full value of their grain was already covered by the merchants' policies. They further submitted that, at any rate, under the 9th condition all the companies whose policies were subsisting at the time of the loss were only liable to contribute their rateable proportion of the loss.

Barnett & Co., having been paid in full, were not made parties to the suit.

The cause was heard before the Master of the Rolls on the 26th of April, 1876.

Matthews, Q.C., *Davey*, Q.C., and *Holl*, Q.C., for the Plaintiff company.

Benjamin, Q.C., *Bagshawe*, Q.C., and *Bevir*, for the *Royal Insurance Company*.

Southgate, Q.C., *Fry*, Q.C., *Cohen*, Q.C., and *Kekewich*, for the other Defendant companies.

Judgment, M.R.

JESSEL, M.R.:—

I am glad that no liability is to be thrown on *Barnett & Co.*, even if I should be of opinion that they are liable for anything. It is obvious to any one acquainted with the nature of the indemnity sought by *Barnett & Co.* from the insurance companies, that nothing of the kind can have been in the contemplation of the parties.

As I understand the matter, and as it appears to me to be proved by the evidence, a wharfinger, by the custom, I suppose, of

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the city of *London*, or at all events by the custom of the trade, is in the same position as a common carrier. He is liable, in the absence of express stipulation, for the safe custody of the goods intrusted to his care; and if the goods are destroyed by fire he is liable in law for breach of duty, in not so carefully attending to the goods that no fire could destroy them. It is no answer on this point to say, "I was not guilty of negligence," because it is negligence not to have prevented accident; and for this purpose it is not necessary to shew that he was guilty of actual negligence or actual default: he is liable for not properly taking care of the goods. That being so, a wharfinger makes a charge to his customers of a sum sufficient to remunerate him not only for his expenses, but also for the risks attending his trade, and, of course, a fair margin of profit. Whether that is charged under the name of wharfage, or lighterage, or consolidated rate, is wholly immaterial for this purpose. It is a charge he makes to his customer for undertaking those duties and liabilities amongst others. That was the position of *Barnett & Co.* in the case in question. There was a large quantity of grain stored in their warehouse, for which they were liable to their customers as wharfingers, and also property of their own.

Some of the customers of *Barnett & Co.*, rightly or wrongly, thought it wise to provide for the possibility of *Barnett & Co.* not being able to meet the large amount of loss which would be incurred in case of fire in their premises. Such loss would have been, and has turned out to be, to a single firm, namely, *Rodocanachi & Co.*, nearly £42,000. Accordingly, *Rodocanachi & Co.* insured their grain themselves with two insurance companies, the *North British* and the *Royal*. *Rodocanachi & Co.* therefore had, as well, the primary liability of the wharfinger, as a subsequent contract of indemnity entered into by these two insurance companies, to meet any loss they might sustain by reason of fire. Then *Barnett & Co.*, wishing to indemnify themselves against the consequences of loss by fire, effected insurances with the *Liverpool, London, and Globe*, and other insurance companies, by means of what have been called the "wharfingers' policies," and it is now admitted that the object of these policies was to indemnify *Barnett & Co.* against any loss occasioned by fire, not only in

respect of their own goods, but also in respect of their customers' goods.

The question which I have to decide is this, whether, a fire having occurred, and a great loss having been sustained, the companies who are liable on the merchants' policies are liable to contribute anything to the amount of that loss, which the wharfingers' policies alone would be more than sufficient to cover. The insurance companies who have granted the wharfingers' policies allege that, by reason of the act of *Rodocanachi & Co.* in insuring gratuitously, so far as the wharfingers are concerned, the grain in question, their liabilities have been diminished by an amount proportionate to the amount insured by the merchants' policies.

The first point to be considered is, what was the true position in law of the companies granting the merchants' policies, as regards *Rodocanachi & Co.*, and as regards *Barnett & Co.* It appears to me that *Barnett & Co.*, not being parties to the contract of indemnity entered into by *Rodocanachi & Co.*, could not derive any benefit from that contract as between themselves and *Rodocanachi & Co.*, and if a fire occurred, as it did occur, and *Rodocanachi & Co.* sued *Barnett & Co.*, the latter must have paid, under their admitted liability, the whole amount of the loss.

But *Rodocanachi & Co.* might have taken another course. They might have sued on the contract of indemnity contained in the merchants' policies. It cannot be denied that, if they had taken that course, then the insurance companies who had granted the merchants' policies must have paid the amount of the insurances effected by those policies, notwithstanding *Rodocanachi & Co.* had a remedy against *Barnett & Co.* But if *Rodocanachi & Co.* had taken the former course, then it is alleged by the Defendants that *Barnett & Co.* would have had a right of contribution against the insurance companies who had granted the merchants' policies.

On the other hand, it is alleged by the Plaintiffs that not only would there have been no such right of contribution, but in case *Rodocanachi & Co.* had elected to sue the grantors of the merchants' policies in the first instance, those grantors would have had a right to sue *Barnett & Co.* either in their own names or in the name of *Rodocanachi & Co.* in order to recover the amount paid by

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them. It appears to me, both on principle and authority, that the contention of the Plaintiffs is the true one. The contract with the grantors of the merchants' policies is a contract of indemnity, and indemnity only. It is to indemnify *Rodocanachi & Co.* against loss by fire. They had a right to sue *Barnett & Co.* for breach of duty. Whether it is a breach of duty, or of custom, which is local law, or whether it is a duty imposed by the general law, or a duty imposed by the contract of carefully keeping the goods, the insurance companies would have a right to say (*Rodocanachi & Co.* and *Barnett & Co.* being, as they are, solvent), "You lose nothing, and our contract is simply a contract of indemnity. Therefore, as you have chosen to sue us and make us pay, which is your caprice, we are entitled to stand in your place as against *Barnett & Co.*, and say, We claim to be put in the same position as if you had pursued your proper remedy, and had made those primarily liable to you pay the amount of the loss."

If that is so, there is nothing further to argue, because it is admitted that if *Barnett & Co.* are liable, there is no claim set up by the insurance companies to throw any part of the liability upon them, whatever view I should take as to the wording of the policies.

But there was a very important question raised as to the wording of the policies, and whether my opinion be or be not worth anything, I think it right to give it for the guidance of persons who may be interested in these matters on future occasions. The policies, I must say, are not well worded. In saying this, I do not impute any blame to the framers of these policies, or of the elaborate conditions on the back of them. But I cannot conceive that the event which has happened was one of the events contemplated by the framers of the instrument; and, therefore, the Court is in the position, in which a Court of construction is often placed, of having to decide on the applicability of the language to a state of things not contemplated by the framers of the instrument. Under these circumstances, it is not unlikely that the words should not exactly fit. In that state of things, I think it is the duty of the Court to adopt that which is a reasonable construction, as contrasted with that which, if not an absurd, would be a very unlikely construction.

These are policies effected by persons who, it was known at the time, were wharfingers. The policies, in their terms, are not only for the assured's own property, but also for property held in trust or on commission, for which they were responsible. It was intended to apply to property not their own, but intrusted to them for safe custody only, and that must be borne in mind in construing the conditions. The framers of the conditions had probably not thought of that at all. They had in view, I imagine, merely and simply the case of a person insuring his own absolute property. The case of a person having a limited interest in property does not seem to have presented itself to their minds. If it had, it would, I think, have been separately and differently provided for. The word "property," as used in several of the conditions, means, not the actual chattel, but the interest of the assured therein. What is the meaning of the words "covering the same property" in the 9th condition? They cannot mean the actual chattel. The most absurd consequences would follow if you read those words in that sense. I am satisfied that this condition was put in to apply to cases where it is the same property that is the subject-matter of the insurance, and the interests are the same. It never could have been meant to apply, for example, to the cases of a tenant for life and remainderman, or a first mortgagee and second mortgagee, both insuring the same goods. You must read the condition in a sensible way, and not assume that these great companies intended to entrap their policy-holders and to destroy the value of the contract of indemnity by reason of the accidental contract of somebody else, which had no connection with the subject-matter of the contract, or with the price paid for the insurance, and so I hold.

It does not appear to me to be creditable to the contracting parties to think that they intended to do anything so absurd as would be the result of my holding otherwise, although I admit that the words are not so clear as they might be, and although it does compel me to put a different meaning on the same word in different parts of the instrument. I think it my duty to make the instrument rational, and to make it a contract such as persons in the city of *London* would be likely to enter into, and not one which would be an utter absurdity.

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Assume for the moment I am right in the view I take of the law, that *Barnett & Co.* are primarily liable, and assume that *Rodocanachi & Co.* had insured for the total amount, and the only goods in the warehouse were their goods, the result would be that, if I am to read the 9th condition literally, there being two insurances of equal amount on the goods, the insurance company who have insured *Barnett & Co.* against liability (for they have only insured them for goods held in trust, or for which they are responsible, and it is therefore an insurance in terms against liability) would only have insured against half the liability, the liability remaining the same. It shews that such could not possibly be the meaning of the parties. Of course, if *Barnett & Co.* were entitled to contribution against the insurance company, to that extent their liability would be diminished, and to that extent, no doubt, the contract of indemnity would be affected by being reduced to a mere liability, against which *Barnett & Co.* were to be insured. In no other way does it appear to me that the wording of the condition ought to interfere with what I consider to be the true contract between the parties.

As regards the argument that *Barnett & Co.* could recover any contribution against the grantors of the merchants' policies, I am at a loss to see, either on principle or authority, any foundation for it.

I am therefore of opinion that there is no ground for exempting the grantees of the wharfingers' policies from their liability to pay the whole amount.

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From this decision the Defendants, except the *Royal Insurance Company*, appealed. The appeal was heard on the 11th of April, 1877.

Argument.

Fry, Q.C., and *Cohen*, Q.C. (*Southgate*, Q.C., and *Kekewich* with them), for the Appellants:—

It is clearly understood that no liability is to be thrown upon *Barnett & Co.* whatever the decision in this suit may be; the only object of the suit being to determine the respective liabilities of the companies.

This is a case of double insurance, in which, if there had been

no conditions annexed to the policies, there would have been contribution between the companies. The insurances were not on the respective interests of the assured, but on the goods themselves: *Waters* v. *Monarch Life Assurance Company* (1); *London and North Western Railway Company* v. *Glyn* (2); *North British Insurance Company* v. *Moffatt* (3); *Dering* v. *Earl Winchelsea* (4).

But we mainly rely on the 9th condition indorsed on the policy. It is a condition which is now commonly annexed to fire policies: *Bunyon* on Insurance Companies (5); and is not necessarily confined to cases in which there would have been contribution without it. The fact that *Barnett & Co.* and their insurers are primarily liable makes no difference; that question is never considered in cases of contribution. Nor does the fact that if *Rodocanachi* had first enforced his claim against his insurers, and so given them a right of subrogation as against *Barnett*, make any difference, because the contract in the policies is express. And this condition being in all the policies alike, the equity affecting them all is the same.

Matthews, Q.C., and *Davey*, Q.C. (*Holl*, Q.C., with them), for the Plaintiff company:—

Barnett & Co. were primarily liable for the grain; but they were not liable as insurers, but as bailees. The companies which granted the merchants' policies to *Rodocanachi & Co.* were liable to indemnify *Rodocanachi & Co.* against loss; but if *Rodocanachi & Co.* came upon them they would be entitled to stand in their place, and recover against *Barnett & Co.*, and so the ultimate liability would fall on *Barnett's* insurers. This is, therefore, not a case in which there would be contribution independently of the 9th condition: *Mason* v. *Sainsbury* (6); *Simpson* v. *Scottish Union Insurance Company* (7); *Dickenson* v. *Jardine* (8); *Yates* v. *Whyte* (9).

The 9th condition was aimed against double insurance or over-insurance. It is only applicable to cases in which there would have been contribution between the companies in equity, and was

(1) 5 E. & B. 870.
(2) 1 E. & E. 652.
(3) Law Rep. 7 C. P. 25.
(4) 2 B. & P. 270; 1 Wh. & T. L. C. 3rd Ed. p. 89.
(5) Page 130.
(6) 3 Dougl. 61.
(7) 1 H. & M. 618.
(8) Law Rep. 3 C. P. 639.
(9) 4 Bing. N. C. 272.

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intended in such cases to prevent circuity of action by limiting the original liability of the companies, instead of driving them to seek contribution against each other. The words "by any other person," refer, not to a stranger, but to an agent. The provision only applies where the two insurances are made by or on behalf of the same person and of the same interest. It could not apply to mortgagee and mortgagor, or to the tenant for life and remainderman; nor does it apply to persons in the relation of a wharfinger and his customer. The wharfinger insures his liability for the goods; the merchant insures his risk of not recovering against the wharfinger. The effect of the construction contended for by the Appellants would be to diminish the security of the insured and prevent him from obtaining a full indemnity, which could not have been intended: *Phillips* on Insurance (1); *Bunyon* on Fire Insurance (2); *North of England Insurance Association* v. *Armstrong* (3); *Commercial Union Assurance Company* v. *Lister* (4); *Howard Insurance Company of New York* v. *Scribner* (5); *Baltimore Insurance Company* v. *Loney* (6); *Stoat* v. *Royal Insurance Company* (7); *Donaldson* v. *Manchester Insurance Company* (8); *Godin* v. *London Assurance Company* (9).

Benjamin, Q.C., *Bagshawe*, Q.C., and *Bevir*, for the *Royal Insurance Company*.

Fry, in reply:—

There is a distinction between several of the cases cited and the present, inasmuch as in them the primary liability arose out of tort, in which case the wrongdoer is always ultimately held liable. It is otherwise in case of contract, where there may be a right of contribution. The present is a case of contract.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I am of opinion that the order of the Master of the Rolls ought to be affirmed, and I agree also in what appears to have been the

(1) Sect. 366.
(2) Pages 130, 199.
(3) Law Rep. 5 Q. B. 244.
(4) Ibid. 7 Ch. 483.
(5) 5 Hill, N. Y. Cas. 298.
(6) 20 Maryl. Rep. 20.
(7) 49 Pensylv. Rep. 14.
(8) 14 Cas. C. Sess. 601.
(9) 1 Burr. 490.

view of the Master of the Rolls, that it is almost a work of supererogation to consider what the true effect and meaning of the 9th condition are—that the whole matter is for this purpose to be determined independently of that clause. The case is this: *Barnett*, being liable to make good any loss by fire of the goods to *Rodocanachi*, insured the goods in one office, and *Rodocanachi*, for his own protection, insured the goods in another office. There was no communication between the two offices or between the two persons insuring. Under these circumstances, it seems to me utterly impossible to say that there could have been any contribution. Contribution exists where the thing is done by the same person against the same loss, and to prevent a man first of all from recovering more than the whole loss, or if he recovers the whole loss from one which he could have recovered from the other, then to make the parties contribute rateably. But that only applies where there is the same person insuring the same interest with more than one office. In the case against the hundred, *Mason* v. *Sainsbury* (1), the language used was, "The insurer and insured are one." So here, *Rodocanachi* and his insurance office were one, and *Barnett* and his insurance office were also one, and the rights are to be determined as between *Rodocanachi* and his office on the one side, and *Barnett* and his office on the other side. That is the relation between the parties. Then as to *Barnett*, according to the evidence, *Barnett* was absolutely liable to make good to *Rodocanachi* the value of the goods. *Barnett*, therefore, could not say to *Rodocanachi*, "Somebody else has been insuring the goods; you go and sue that somebody else." It was not a contract of indemnity to indemnify *Barnett* against the claim of *Rodocanachi*, but it was a further contract which *Rodocanachi* got for his own security. If *Rodocanachi* had upon the invitation of *Barnett* gone against the office in the first instance, if it is true that *Barnett* was under an absolute liability to *Rodocanachi* to make good the entire loss, what was there to prevent the office from availing themselves of the right to sue *Barnett* in *Rodocanachi's* name? To such an action as that I am at a loss to see how, between *Rodocanachi* and *Barnett*, the language of *Rodocanachi's* policy

(1) 3 Dougl. 61.

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of insurance or the language of *Barnett's* policy of insurance could have the slightest effect. *Rodocanachi's* case would be that *Barnett* ought to return him the goods he had, or ought to pay him the value of them. And if *Barnett* said, "You ought to have sued somebody else," the reply would have been, "What is that to you? You owe me the goods; you are primarily liable." That being so, it seems to me the result follows, as the Master of the Rolls has said, that, *Barnett* being liable to make good the loss to *Rodocanachi,* and if the insurance office pays *Rodocanachi,* being liable through *Rodocanachi's* contract to make it good to the insurance office, it is utterly impossible to say that the language of the contract between *Barnett* and his insurance office can deprive *Rodocanachi's* insurance office of the right which they acquired, or make them liable to contribute anything which they were not otherwise liable as between themselves and *Rodocanachi* and *Barnett.*

Then, as the Master of the Rolls says, it may be that from the peculiar language of the contract between *Barnett* and his insurance office *Barnett* has somehow or other put himself in this position, that he would be prejudiced by the mere fact that *Rodocanachi,* without his privity, had been minded to effect another insurance upon it. If so, that is a damage which *Barnett* has incurred himself. That cannot enable him to throw that damage on the other insurance office that had nothing to do with him. That is a mere matter of contribution between himself and his own insurance office.

Upon the whole, I am of opinion that the meaning of the contract is what the Master of the Rolls says it is, if it is necessary to express an opinion upon it, and that the 9th clause must mean this, that there is to be a limit to the liability of the respective offices in these cases where the respective offices are legally liable to contribute to the same loss in respect of the same fire. If there was not equal liability, if there was not a thing to which they were entitled to contribute—and in my opinion there was not in this case—then the 9th clause does not apply. I do not think it necessary to go any further into the case, except to express my agreement with the Master of the Rolls.

MELLISH, L.J.:—

I am of the same opinion. There are two questions to be considered. The first is whether, independently of the 9th clause, *Rodocanachi's* insurers were entitled merely to a contribution as against *Barnett* and *Barnett's* insurers, or whether they were entitled to be subrogated into *Rodocanachi's* rights, so as to be fully indemnified by *Barnett*.

Now I do not know of any English cases on the subject of contribution as applied to fire policies; but I can see no reason why the principle in respect of contribution should not be exactly the same in respect of fire policies as they are in respect of marine policies, and I think if the same person in respect of the same right insures in two offices, there is no reason why they should not contribute in equal proportions in respect of a fire policy as they would in the case of a marine policy. The rule is perfectly established in the case of a marine policy that contribution only applies where it is an insurance by the same person having the same rights, and does not apply where different persons insure in respect of different rights. The reason of that is obvious enough. Where different persons insure the same property in respect of their different rights they may be divided into two classes. It may be that the interest of the two between them makes up the whole property, as in the case of a tenant for life and remainderman. Then if each insures, although they may use words apparently insuring the whole property, yet they would recover from their respective insurance companies the value of their own interests, and of course those values added together would make up the value of the whole property. Therefore it would not be a case either of subrogation or contribution, because the loss would be divided between the two companies in proportion to the interests which the respective persons assured had in the property. But then there may be cases where, although two different persons insured in respect of different rights, each of them can recover the whole, as in the case of a mortgagor and mortgagee. But wherever that is the case it will necessarily follow that one of these two has a remedy over against the other, because the same property cannot in value belong at the same time to two different persons. Each of them may have an interest which entitles him to insure

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for the full value, because in certain events, for instance, if the other person become insolvent, it may be he would lose the full value of the property, and therefore would have in law an insurable interest; but yet it must be that if each recover the full value of the property from their respective offices with whom they insure, one office must have a remedy against the other. I think whenever that is the case the company which has insured the person who has the remedy over succeeds to his right of remedy over, and then it is a case of subrogation.

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Now this is really a case of bailment of goods upon particular terms. If there were no special terms at all, but the goods were simply bailed on terms that they were to be taken reasonable care of, and the bailee insured the goods for the purpose of protecting himself against any liability he might sustain, and then they were lost by fire by the carelessness of the bailee, there would not be the least doubt that that would be a right of subrogation in the ordinary case of an action for negligence. It would be just the same as where a ship is lost by collision and the underwriter of that ship succeeds to the benefit of the action against the wrongdoers. And in my opinion it makes no difference that here the bailment, instead of being in the mere ordinary terms that the bailee should be liable to take due care, is upon the terms that he should be absolutely liable in the case of loss by fire. That is not a contract of insurance so as to make the bailee himself an insurer, but it is really the terms of a contract of bailment by which he says, "If the property is lost by fire I will not put you to proof whether it is lost by carelessness or not, it is part of the contract of bailment that I am absolutely liable in the case of a fire." That is merely part of the terms of the contract of bailment. Mr. *Fry* made a distinction between whether it was tort or whether it was contract. What it really is is that which is a very common thing in our law, namely, tort arising out of contract. The relation of the parties entirely depends upon contract, but at the same time it is so far tort that you might have sued on it according to the old law in an action on the case. Assuming for a moment that *Barnett* had not been insured at all but that the simple question was whether *Rodocanachi's* insurers, having paid *Rodocanachi*, would be entitled to be subrogated into his rights. I am of opinion that

they would be as against *Barnett*, and, that being so, it is not a case for contribution, because it is not a case where the loss is to be divided. One company has no equity against the other. Having each insured the whole property, one has a valid remedy over and the other has not, and therefore this is not a case of contribution between them.

Then the only question remaining is whether the insertion of the 9th clause makes any difference. I agree with the Master of the Rolls, whatever the construction may be of that clause, it cannot have any effect upon the right of subrogation. It is argued that being in both policies, the insurance company who insured *Rodocanachi* are only liable for one moiety. But supposing they are only liable for one moiety, still they are entitled in respect of that moiety to be subrogated to *Rodocanachi's* right of action over against *Barnett*. I cannot see how the 9th clause can possibly affect that right, and therefore they are still in that position, that, *Barnett* being perfectly solvent, they are liable for nothing; because, although they are liable either for the whole or for a half to *Rodocanachi*, they have a remedy over against *Barnett* to recover that whole or that half from him. So that practically the insurance company who have insured *Rodocanachi* are not liable for anything, and not being liable for anything, and because they have got a remedy over against *Barnett* to recover against *Barnett* if they are liable to pay *Rodocanachi*, I do not see how the insertion of the 9th clause in either policy or in both policies can make them liable for anything they are not liable for.

When, therefore, I come to the question what is the real construction of the 9th clause, I approach the question on the assumption that the law is as I have said with reference to that, and we have to say whether the 9th clause would really prevent *Barnett*, he being the person really interested in it, from recovering more than a moiety from his insurance company. I venture to say that it never could have been the intention of the insurance company to prevent him recovering it. They have used words which are difficult to construe, and which *primâ facie* at the commencement of them do appear to apply to the case, because there is an insurance covering the same property. I agree with what Mr. *Fry* says, that there is some difficulty in construing the words

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"covering the same property" to mean only "the interest in the same property." Then it ends by saying the consequence is to be that "this company shall not be liable to pay or contribute more than its rateable proportion of such loss or damage." That seems to me plainly to imply that the other company is to be liable to pay the other proportion. Here the facts are such that the other company, for the reasons I have given, are not liable to pay the other proportion, because the other company is not liable to pay anything. It is liable to pay *Rodocanachi* the moiety or the whole, but then, whether it is the whole or the moiety, it has the remedy over against *Barnett*, and therefore it is practically liable to pay nothing. In my opinion this 9th clause never could have been intended to apply to a case in which the consequences would be that the insured would be deprived of his full remedy. The object was not to deprive him of his full remedy, but that when there was a liability in several companies, then the loss might be divided equally between them, instead of the one being liable for the whole, and being put to his right of contribution. I am of opinion that the judgment of the Master of the Rolls ought to be affirmed.

Baggallay, J.A.

BAGGALLAY, J.A.:—

I am of the same opinion. The view I take of this case is shortly this. Whether by operation of law or by custom in the granary trade in *London*, or by virtue of some special contract between Messrs. *Barnett* and Messrs. *Rodocanachi*, Messrs. *Barnett*, as wharfingers, became liable for any loss or damage which might occur to the grain which was warehoused with them by *Rodocanachi*. Now, it has not been contended that *Barnett & Co.* were under any obligation to insure in respect of the grain so deposited with them. It was an option on their part, and if done was done for their own protection. I would, therefore, consider the case first as to how the matter would have stood if Messrs. *Barnett & Co.* had not insured. I take it to be this: *Rodocanachi*, having the primary liability of the wharfinger for their own protection, insured in the Plaintiff's and other offices. The fire having occurred, if Messrs. *Barnett* had paid the full amount of the loss to Messrs. *Rodocanachi*, I cannot think it would be contended upon any

plausible ground, even if Messrs. *Barnett & Co.* could have sued, that they could have used the name of *Rodocanachi* for the purpose of suing the Plaintiff company with respect to the policies which had been effected by them. But, on the other hand, having regard to the primary liability of the wharfinger, Messrs. *Barnett*, to *Rodocanachi*, if the Plaintiff company had in the first instance paid the amount of the insurance to Messrs. *Rodocanachi*, then I apprehend, upon the authority of the cases of *Mason* v. *Sainsbury* (1) and *Clark* v. *Inhabitants of Blything* (2), the Plaintiff company would have been entitled to use the name of *Rodocanachi* for the purpose of suing Messrs. *Barnett & Co.*

If that had been the state of the case, if Messrs. *Barnett & Co.* had not insured, how is it affected by the circumstance that they did insure, and for a large amount? In the first place, I will consider what would have been the effect if they had insured by policies not containing the special clause. Then I apprehend the question would have arisen, whether there was or was not a double insurance as recognised by law and practice. I am not aware that there have been any cases with reference to fire policies similar to those which have arisen on marine policies; but should any such arise, I do not see why the principle enunciated by Lord *Mansfield* in the old case of *Godin* v. *London Assurance Company* (3) should not be equally applicable to fire policies as to marine policies. One passage of his judgment has been referred to in the course of the argument, and there is another very concise statement by him to this effect: "But a double insurance is where the same man is to receive two sums instead of one, or the same sum twice over for the same loss by reason of his having made two insurances upon the same goods or the same ship."

Then, is the question altered by the fact that in these policies there has been a particular condition introduced which is recognised as the 9th condition? We are not called on to say what the result might have been if there had been a universal rule established as regards fire policies, to the effect that the very fact that the conditions are specially introduced into the policies when they are intended to have effect would negative the idea that there

(1) 3 Dougl. 61. (2) 2 B. & C. 254.
(3) 1 Burr. 490.

C. A. 1877 NORTH BRITISH AND MERCANTILE INSURANCE COMPANY v. LONDON, LIVERPOOL, AND GLOBE INSURANCE COMPANY. Judgment, C. A. Baggallay, J.A.

is any general rule, or any general custom, with respect to that matter. Then I apprehend that this is a condition introduced into the policy which *primâ facie* is binding upon the parties to that contract. It may impose a limit to the liability of the Defendant company or of Messrs. *Barnett* with respect to the amount that can be recovered, but at present I cannot see how the existence of the condition in the policy effected by Messrs. *Barnett* can in any way affect the interest of *Rodocanachi* or the Plaintiff company; and it therefore would appear to me really immaterial to consider what the true construction of that condition is. But I am bound to say that in my opinion it in effect, although it may not be very clearly expressed, really amounts to this, that where there are several policies, and where there, in point of fact, is a double insurance, then in order to do away with the old practice of the insured recovering the whole from one of the several insurance offices, and then the one from whom it was recovered being put to obtain contribution from the others, this clause was put in to say that the insured should, in the first instance, proceed against the several insurance companies for the aliquot parts for which they are liable in consequence of that condition.

Upon the whole, I am of opinion that the decision of the Master of the Rolls in this case was right, and that the appeal should be dismissed.

Solicitors for Appellants: *Lawes & Sons.*

Solicitors for Respondents: Sir *W. R. Drake; G. P. L. Eyre & Co.*, agents for *Garnett, Tarbett, & Co., Liverpool.*

WHITE *v.* WITT.

[1873 W. 46.]

C. A.
1877
March 3, 14.

Practice—Time for Appealing—Order on Further Consideration and Summons to vary Certificate—Rules of Court, 1875, *Order* LVIII., *r.* 14.

Goods seized in execution were claimed by the trustees of a settlement made by the debtor. A decree was made in an interpleader suit directing an inquiry whether the settlement was a valid settlement of the goods, and who were entitled to them. The Chief Clerk certified that the settlement was invalid, and the judgment creditor entitled. By an order made on further consideration and on adjourned summons to vary the certificate, the Court declared the settlement valid, and ordered the certificate to be varied accordingly, and directed the proceeds of the goods to be paid to the trustees:—

Held, that the substantial part of this order was an order to vary the certificate, which was an interlocutory order, and that an appeal brought after twenty-one days was too late.

Statement.

THIS was an appeal by *Witt* from an order made on further consideration and on an application to vary the Chief Clerk's certificate. The suit was an interpleader suit by the sheriffs of the city of *London* and the sheriff of *Middlesex*, who had seized, on the 17th of February, 1873, certain chattels under a writ of *fi. fa.* issued at the suit of the Defendant *Witt* against the Defendant *Corcoran*. These chattels were claimed by the Defendants *Horne* and *Phillips*, as trustees of a post-nuptial settlement executed by *Corcoran* on the 5th of March, 1869, and duly registered under the *Bills of Sale Act*. The Plaintiffs moved for an injunction to restrain proceedings by *Witt* and the trustees. The motion was by consent treated as a motion for a decree, and on the 15th of March, 1873, a decree was made which directed an inquiry whether the settlement of the 5th of March, 1869, was or was not a valid bill of sale as against the seizure of the chattels therein comprised by the Plaintiffs as sheriff of *Middlesex*, and an inquiry who were entitled to the chattels so seized. The Defendants *Horne* and *Phillips* undertaking to pay into Court 150*l*., the agreed value of the chattels, the Plaintiffs were directed to assign the chattels to them.

C. A. 1877 WHITE v. WITT.

Statement.

The Chief Clerk, by certificate dated the 1st of July, 1873, and filed on the 7th, certified that the settlement was not a valid bill of sale as against the seizure by the Plaintiffs, and that the Defendant *Witt* was entitled to the chattels seized.

The Defendants *Horne* and *Phillips* applied to vary the certificate, and the application was adjourned into Court to come on with the hearing on further consideration.

By order, dated the 29th of April, 1876, made on further consideration, and on the adjourned application to vary, the Court declared the settlement a good settlement, and ordered the certificate to be varied by finding accordingly. The fund in Court was ordered to be paid to *Horne* and *Phillips* as trustees of the settlement, and the Defendant *Witt* was ordered to pay the costs of all parties.

On the 7th of November, 1876, the Defendant *Witt* appealed.

The appeal came on for hearing on the 3rd of March, 1877.

Argument.

J. Pearson, Q.C., and *Nalder*, for the Appellant.

Glasse, Q.C., and *Everitt*, for the trustees, and *Romer* for *Corcoran*, took the objection that the appeal from the order varying the certificate ought to have been brought within twenty-one days: *Cummins* v. *Herron* (1).

J. Pearson, Q.C., and *Nalder*, *contrà*:—

There was no certificate against the Appellant here as in that case. The certificate has never in fact been varied, but the whole case being before the Judge he has, in substance, made an order against us notwithstanding the certificate. The right to appeal against the order on further consideration is not taken away by an interlocutory order not being subject to appeal: Rules of Court, 1875, Order LVIII., r. 14; *Sugden* v. *Lord St. Leonards* (2).

[JESSEL, M.R.:—That rule was only intended to prevent the right of appeal from being interfered with by the existence of an interlocutory order which incidentally involved a decision of the point.

JAMES, L.J.:—It was never intended that an interlocutory order,

(1) 4 Ch. D. 787. (2) 1 P. D. 154, 208.

which amounts to a finding or verdict, should be open to appeal after the twenty-one days, because the time for appeal from the final order founded on it has not expired.]

We could not appeal separately from the order varying the certificate: *Bloxam* v. *Whipham* (1).

W. C. Harvey, for the Plaintiffs.

Judgment, Jessel, M.R.

JESSEL, M.R.:—

In this case the order, although its form gives rise to an argument, is, in substance, no more than this: The Court being of opinion that the deed is good, orders the Chief Clerk's certificate to be varied. In substance, therefore, the order was an order upon an application to vary the Chief Clerk's certificate, and that was an interlocutory application, the decision upon it was a decision upon an interlocutory application, and the appeal, therefore, ought to have been brought within the twenty-one days.

It has been said, and truly said, that in this particular case, the whole cause of action was referred to Chambers. That, as we know, is every day's practice. Nothing is more familiar than the institution of an administration suit for the purpose of trying the validity of a debt where there would be no suit except for the contested debt. The validity of the debt is tried upon interlocutory application, and in no other way, unless the Judge directs an issue, or something of that kind, to try it in open Court. There are cases of another kind, with which, I am sorry to say, I am very familiar, viz., cases where there is a disputed payment, a question who are next of kin, or some other question of that kind, and an administration summons is taken out merely to try that question, and for no other purpose. There, again, although the question may be one relating to legitimacy, and may be of the utmost importance to the peace of a family, it is tried upon interlocutory application, and an appeal cannot be brought after twenty-one days. It is impossible for us to look at the nature of the contest, we must look at the form of the proceeding, and this

(1) 8 W. R. 2.

C. A. 1877 WHITE v. WITT.

being, as I said before, an interlocutory proceeding, the appeal cannot be entertained.

JAMES, L.J., MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *Bartley, Saxton, & Morgan; W. & J. Flower & Nussey; W. Maynard; Bell, Brodrick, & Gray.*

C. A. 1877 *March* 14.

LEIGH *v.* BROOKS.

[1876 L. 170.]

Referee—"Scientific Investigation"—Fraud—Supreme Court of Judicature Act, 1873, *s.* 57.

SQBD 667.

An executrix brought an action to set aside for fraud the sale by the Defendant to her testator of about 130 pictures for prices amounting in the whole to £50,000. The defence denied the fraud. The Plaintiff moved to have the questions referred to a special referee under the *Judicature Act*, 1873, s. 57, on the ground that the examination of the pictures required a scientific investigation, which could not conveniently be had before a jury. The Defendant opposed and stated his wish for a trial by a jury:—

Held (affirming the decision of *Hall*, V.C.), that the case was not within the purview of sect. 57, so as to give jurisdiction, without the consent of all parties, to send it to a referee; and that if there had been jurisdiction, still as the case involved questions of fraud seriously affecting the character and fortune of the Defendant, it ought not, against his will, to be tried otherwise than in open Court.

Statement.

THIS was an appeal by the Plaintiff from a decision of Vice-Chancellor *Hall* refusing to refer the matters in dispute to a referee.

The Plaintiff was the widow and executrix of Mr. *Leigh*, who died in February, 1875. Within two years before Mr. *Leigh's* death he bought pictures and works of art to a very large amount from the Defendant *Brooks*, who was a picture dealer. Most of the goods supplied were paid for by Mr. *Leigh*, the amount paid being about £50,000. Others were unpaid for at his decease.

In July, 1875, a decree was made at the suit of a creditor for the administration of Mr. *Leigh's* estate. Under this decree *Brooks* carried in a claim for £19,193 for goods supplied and not

paid for. This claim was disputed, and on the 1st of June, 1876, Vice-Chancellor *Hall* made an order referring it to an official referee (1). No question as to whether any of the sales were fraudulent appeared to have been raised on that occasion.

On the 22nd of June, 1876, Mrs. *Leigh* issued the writ in the present action, impeaching the sales of most of the pictures as fraudulent. The statement of claim alleged that only about seventy-six of the less important of the 132 pictures bought by Mr. *Leigh* and paid for were works of the artists by whom the Defendant represented them to have been painted; that the remaining fifty-six were not by the artists by whom the Defendant represented to Mr. *Leigh* that they had been painted, and that the Defendant knew this when he sold them; that the prices charged by the Defendant for 110 of the pictures were very much more than any price which could fairly be asked for them, and were known to the Defendant to be so; that in many cases the Defendant charged four, five, and six times, in some instances ten and twelve times, in one instance sixty times, and in another several hundred times the real value of the pictures. The statement of claim alleged that Mr. *Leigh* acted under the advice of the Defendant in buying the pictures; that the Defendant did not believe the pictures to be the works of the artists by whom he represented them to have been painted; and that Mr *Leigh* had been induced to give the exorbitant prices charged in consequence of the Defendant's improper representations. The Plaintiff claimed to have the sales set aside and the purchase-money refunded, the Plaintiff offering to abide by any order the Court might make as to the return of the pictures.

The Defendant by his statement of defence denied all the allegations of fraud. He denied that the pictures had been bought under his advice, and stated that Mr. *Leigh* bought as an independent purchaser according to his own judgment and wishes. He said that, as appeared on the face of his invoices, he did not warrant the genuineness of any pictures sold by him, but that he had truly given the names of the artists by whom he believed the pictures to have been painted, and that he still believed them to be the works of those artists; and he pleaded a priced list of the pictures

(1) 3 Ch. D. 292.

C. A. 1877 LEIGH v. BROOKS. Statement.

shewing the amount of the purchase-money upon which the Defendant had written a receipt, as being a stated and settled account. A reply was delivered on the 8th of February, 1877.

On the 15th of February Mrs. *Leigh* moved that the questions or issues in this action might be referred for trial to *C. M. Roupell*, Esq. (to whom *Brooks's* claim in *Rowcliffe* v. *Leigh* stood referred), and that such questions or issues might be tried cotemporaneously with the claim of *Brooks* already referred to him.

The Vice-Chancellor refused the application, on the ground, as was stated at the bar, that he considered himself to have no jurisdiction to make the order.

Mrs. *Leigh* appealed.

Argument.

Dickinson, Q.C., *A. L. Smith*, and *Methold*, for the Appellant:—

[JESSEL, M.R.:—Is not this an appeal from the discretion of the Vice-Chancellor. If he says, I will not refer the case, but will try it myself, are we to compel him to refer it?]

The Vice-Chancellor evidently wished to refer it, but considered that he had no jurisdiction to do so; he put his decision solely on that ground.

[JESSEL, M.R.:—Then the case may proceed.]

This is a case in which nearly 130 pictures will have to be examined and evidence of experts taken; it requires a scientific investigation, which cannot conveniently be taken before a jury, and is within the *Judicature Act*, 1873, s. 57.

[JESSEL, M.R.:—This is hardly to be called "scientific investigation."]

At all events it is a detailed investigation which cannot conveniently be made before a jury.

[JESSEL, M.R.:—I do not see that it cannot; the case will be a long one; the objection comes to no more than that. The Defendant may wish to have the issue of fraud tried by a jury.

W. Pearson, Q.C.:—He does so wish.]

A complicated mass of evidence of this kind on a number of separate points can be much more effectually investigated before

a referee. The Vice-Chancellor referred the claim of *Brooks*, which involves the same question.

C. A. 1877 LEIGH v. BROOKS.

[JESSEL, M.R.:—I cannot find that any issue of fraud was raised in that case.]

W. Pearson, Q.C., and *Millar*, for *Brooks*, were not called on.

JESSEL, M.R.:— Judgment, Jessel, M.R.

This case is one in which the fortune and character of Mr. *Brooks* are at stake, and what is asked is to deprive him of the advantage of having the case decided by a Judge in a public Court and in the presence of the Bar, and to oblige him to have it tried in a private room before a Judge of inferior standing. I am of opinion that such an application ought to be refused even if there were jurisdiction to grant it, and I do not think that a case like this is within the purview of the 57th section of the Act.

JAMES, L.J.:— James, L.J.

Even if there were jurisdiction to make the order asked, which I think there is not, the case is one in which the Defendant ought not to be compelled to go before a referee. If a man says, "My character is at stake, and I insist upon having the case tried in open Court," I should be shocked to find that any course of proceeding in this Court interfered with his right to have it so tried.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *Gregory, Rowcliffe, & Co; Duignan & Smiles.*

C. A.
1877
April 10.

In re MAYHEW.
ROWLES *v.* MAYHEW.

[1876 M. 286.]

Order of Probate Division charging Assets—Costs of Suit—Priority.

After an order had been made in the Chancery Division for the administration of the estate of a testator, an order was made in the Probate Division that the costs of the Plaintiffs in a suit there should be paid out of the estate "and have priority over all other claims on the estate:"—

Held, by the Court of Appeal (affirming the decision of *Malins*, V.C.), that these costs were to be postponed to the costs of administration in the Chancery Division.

Statement.

SEPTIMUS MAYHEW died on the 25th of December, 1875, leaving a will by which he appointed his widow, *Laura Mayhew*, sole executrix. He was at his death indebted to the *Real and Personal Advance Company* in £32 on a bill of exchange.

The widow not having taken any steps to prove the will, a subpœna was issued against her on the 25th of April, 1876, commanding her to bring the will into the Probate Court, which she did on the 3rd of May. Her solicitor having stated that he had received no instructions as to proving the will, the company on the 19th of May, issued a writ of citation calling upon her to prove the will, or allow the company to take out letters of administration with the will annexed. The Defendant appeared, and on the 31st of July an order was made that she should have fourteen days from that date to take out probate, and that in default it should be granted to the company. Probate not having been taken out, the company, on the 22nd of August, applied for an order that the grant should be made to them; but this was refused, as the executrix had taken out a summons for an enlargement of time. Ultimately the executrix proved the will on the 1st of September, 1876.

On the 15th of September, 1876, an order was made for the administration of the estate in the present suit by a creditor.

On the 21st of November, 1876, an order was made by Sir *James Hannen*, in the Probate Division, "that the costs of the Plaintiffs be paid out of the estate, and to have priority of other

claims on the estate." These costs were taxed on the 30th of December.

The company then applied, by summons in this suit, to shew cause why the executrix should not pay these costs in priority to all other claims on the estate pursuant to the order of the 21st of November, 1876. Vice-Chancellor *Malins*, on the 17th of January, 1877, refused the application in Chambers, and on the 3rd of March, 1877, he refused, with costs, a motion to the like effect.

The company appealed.

Argument.

Morgan, Q.C., and *Cozens-Hardy*, for the Appellant company :—

The order of the 21st of November, 1876, was within the jurisdiction of the Probate Division: 20 & 21 Vict. c. 77, ss. 23, 25, 65; *Williams* v. *Davis* (1).

[JAMES, L.J. :—Do you ask for priority over the costs of suit or only over other claims ?]

Over everything.

[MELLISH, L.J. :—Can another Court make an order dealing with the assets after a decree has been made by the Chancery Division for administering them ?]

The jurisdiction of the Probate Division attached first. The Vice-Chancellor treated the case as governed by *Major* v. *Major* (2), but that case was before the *Probate Act*. The *Judicature Act*, 1873, s. 5, makes all the Judges Judges of one Court, and so gives power to one Division to make orders binding on another Division.

Horton Smith, for the Defendant, and *Willis Bund*, for the Plaintiff, were not called upon.

Judgment.

JAMES, L.J. :—

It is clear that a charge created by an order of a Court which is not administering the estate can only operate upon what remains after payment of the costs of administration.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *Dillon-Webb & Kelly; Withall & Compton.*

(1) 3 Sw. & Tr. 437.

(2) 2 Drew. 281.

C. A.
1877
April 13, 14.

MARSDEN *v.* KENT.

[1875 M. 136.]

Executors—Delay in Conversion—Discretion.

13 Ch D. 658

A testator bequeathed his personal estate to his executors upon trust to divide it equally among four persons, all of whom were of age. A considerable part of the estate consisted of three foreign railway bonds of very uncertain value. At the time of the testator's death they were worth about £150 each, but their value was declining rapidly, and at the end of a twelvemonth they were worth about £54 each. One of the legatees during the year repeatedly pressed the executors to sell, but the others did not join in doing so, and the executors thought it best to wait for the chance of a rise. Ultimately, fifteen months after the death, they sold two of the bonds for £54 each. The third, which remained unsold, had fallen far below that value:—

Held (affirming the decision of *Hall*, V.C.), that as the executors had acted in the honest exercise of their discretion as to the time of selling property of a very uncertain and speculative character they ought not to be made personally responsible for the loss arising from their not having sold within the twelvemonth.

Buxton v. *Buxton* (1) approved and followed.

Statement.

JOHN MARSDEN died on the 10th of July, 1873, leaving a will by which he appointed the Defendants his executors, and bequeathed to them all his personal estate upon trust to divide the same equally amongst his niece Mrs. *Church* and the Plaintiffs *George Marsden*, *Walter Marsden*, and *Henry Marsden*. The Defendants proved the will on the 8th of August, 1873, the property being sworn under £800.

Part of the property of the testator consisted of three second mortgage bonds of the *Atlantic and Great Western Railway Company* of *America*, which were of very fluctuating value. In August, 1873, according to the share lists, they were worth £153 each, but their market price fell from month to month during the remainder of that year, and in December was only £115. In March, 1874, it fell to £80, and in the following months the prices were as follows:—April, £76; May, £74; June, £54; July, £56; August, £54; September, £58; October, £54; November, £41 10*s*.

(1) 1 My. & Cr. 80.

Statement.

On the 7th of November, 1874, the Defendants sold two of the bonds for £52 each. The other was still unsold, and at the time of the hearing was only worth £20.

George Marsden, one of the Plaintiffs, repeatedly pressed the Defendants to sell the bonds, but it did not appear that any of the other three residuary legatees ever concurred with him in so doing.

The bill was filed in May, 1875, for the administration of the testator's estate, and prayed that it might be declared that the Defendants were liable to make good to the estate the amount of the market value of the bonds at the testator's death.

The Defendants, by their answer, stated that the question of disposing of the bonds received their careful attention as soon as probate had been obtained; that they at once endeavoured to find a purchaser, but that the bonds were then rapidly falling, and the Defendants, at the request of the residuary legatees, abstained from selling, hoping that there would be a rise; that the Defendants had been in continual correspondence with the residuary legatees as to the best mode of dealing with the bonds, and that in March, 1874, *George Marsden*, one of the Plaintiffs, offered to take one of the bonds at its market price, but the other residuary legatees would not agree to it; that ultimately, in November, 1874, they sold two of the bonds for £52 each, being the best price they could get, but could not find a purchaser for the third. They further stated that throughout their dealings with the estate they had acted *bonâ fide* with an anxious desire to do the best they could for the estate.

Vice-Chancellor *Hall* held that under the circumstances of the case the Defendants ought not to be fixed with the loss arising from not having converted the bonds earlier. The Plaintiffs appealed.

Argument.

W. Pearson, Q.C., and *Bilton*, for the Appellants:—

The trustees having no discretion given them by the will as to the time of selling, must shew a good reason for retaining the bond beyond twelve months. The case they set up is that they had the authority of the *cestuis que trust* to retain it; but such authority is not proved. One of the Plaintiffs was constantly pressing

C. A. 1877 MARSDEN v. KENT.

a sale, and no prudent owner would have acted as these trustees did.

[BAGGALLAY, J.A., referred to *Buxton* v. *Buxton* (1)].

Grayburn v. *Clarkson* (2), is in our favour.

Argument.

[*Dickinson*, Q.C.:—That relates to shares with unlimited liability.]

Hughes v. *Empson* (3) is the same way, and does not relate to shares with unlimited liability. The duty of the trustees was to sell within a reasonable time. What is a reasonable time depends upon circumstances. For most property twelve months is a reasonable time, and if trustees exceed it the burden lies on them to justify their not selling.

Dickinson, Q.C., and *Romer*, for the Defendants, were not called upon.

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion that under the special circumstances of this case the decision of the Vice-Chancellor ought to be affirmed. The testator left money invested in these speculative securities. The executors were entitled to wait twelve months before they converted them. At that time the market had fallen. They hoped it would rise and therefore delayed the sale, a course of proceeding which has resulted in a loss. The executors acted with no view of obtaining any benefit to themselves; with no view of benefiting a tenant for life without due regard to the interests of the ulterior takers; they appear to have acted honestly with a view to what they thought beneficial to everybody interested. They received the dividends during the twelve months, and of that the residuary legatees have the benefit. The legatees were *sui juris*, competent to direct what should be done about the property. One of them went to the executors to ask them to sell. The executors were not bound to act on his judgment; he should have called on the other legatees and asked them to join in an application to the executors to sell. If they had all concurred in such an application the executors would, no doubt, have complied

(1) 1 My. & Cr. 80. (2) Law Rep. 3 Ch. 605.
(3) 22 Beav. 181.

C. A. 1877 MARSDEN v. KENT. Judgment, James, L.J.

with it, and if a majority had so applied it is probable that the executors would at once have sold. The executors in the honest exercise of their discretion thought it more prudent to wait for a rise, and we think they ought not to suffer because it turns out that they committed an error of judgment. As to two of the bonds the loss was almost nominal, on the third the loss is considerable; but we think that we ought to follow *Buxton* v. *Buxton* (1), which is almost on all fours with the present case. It would be very hard upon executors who have been saddled with property of this speculative kind, and have endeavoured to do their duty honestly, if they were to be fixed with a loss arising from their not having taken what, as it is proved by the result, would have been the best course.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *T. W. Goldring; G. Johnson.*

In re BURROUGHS, LYNN, AND SEXTON.

C. A. 1877 *April* 14.

[1875 B. 172.]

Vendor and Purchaser Act, 1874 (37 & 38 *Vict. c.* 78), *s.* 9—*Evidence.*

The purchaser of a farm, consisting in part of 400 acres of heath land, took the objection that a title was not shewn to the soil of the heath land, but only to rights of pasturage over it. The vendors took out a summons under the *Vendor and Purchaser Act*, 1874, asking that it might be declared that the purchaser's objections and requisitions were sufficiently answered. Affidavits were filed on both sides, and the deponents were cross-examined. The Master of the Rolls rejected the affidavits and cross-examination, on the ground that evidence by affidavit upon requisitions as to title under the Act ought not to be given unless required by the Judge:—

Held, by the Court of Appeal, that the evidence ought to have been admitted, for that, on a proceeding under the *Vendor and Purchaser Act*, 1874, the parties are in the same position as they would have been under a reference as to title in a suit for specific performance.

Statement.

THE Rev. *Thomas Burroughs* and *James Lynn*, on the 6th of May, 1873, sold by auction to *Frederick Sexton*, a property called the *Valley Farm*, consisting of 13A. 14P. of arable, pasture, and

(1) 1 My. & Cr. 80.

C. A. 1877 *In re* BURROUGHS, LYNN, AND SEXTON.

woodland, and 422A. 3R. 13P. of heath land. The question arose whether a title was shewn to the soil of this heath land, the purchaser contending that only a title to rights of pasturage over it was made out.

Statement.

On the 25th of May, 1875, the vendors took out a summons under the *Vendor and Purchaser Act*, 1874, asking that it might be declared that the purchasers' objections and requisitions had been sufficiently answered, and that a good title had been shewn, and that the vendors were entitled to have the contract specifically performed, and that the purchasers might be ordered specifically to perform the same, and to pay the costs of the application.

Affidavits were filed on both sides, and several of the deponents were cross-examined.

The Master of the Rolls, on the 25th of November, 1876, rejected the affidavits and cross-examinations, and made an order in which the abstracts of title, copy requisitions, and observations on title, with replies thereto and remarks on the replies, translations of Court rolls, several letters, an agreement for a lease, a counterpart lease, and several statutory declarations made during the investigation of title, were entered as read. The order then proceeded as follows:—"And the Court refusing to hear the evidence upon affidavit filed since summons taken out, and the cross-examination of deponents on such affidavits tendered on either side, on the ground that evidence by affidavit upon requisitions as to title under the *Vendor and Purchaser Act*, 1874, ought not to be given unless required by the Judge, this Court doth declare" that the purchasers' requisitions and objections in respect to the title of the above-mentioned hereditaments had been sufficiently answered by the vendors, and that a good title had been shewn in accordance with the particulars and conditions of sale. And the purchaser was ordered to pay the costs of the application.

The purchaser appealed from this order.

Argument

Roxburgh, Q.C., and *Phear*, for the Appellant:—

We rely upon the evidence which was rejected by the Master of the Rolls, and the first question to be decided is whether this evidence was rightly excluded on a summons under 37 & 38 Vict. c. 78, s. 9.

C. A. 1877 *In re* BURROUGHS, LYNN, AND SEXTON. Argument.

[JAMES, L.J.:—I have always considered that the Act was intended to enable the Court to decide in a summary way, without a specific performance suit, such questions as whether a requisition has been sufficiently answered according to the practice of conveyancers, whether a requisition is precluded by the conditions, and the like, but not to enable the Court to try in this way disputed questions of fact.

BAGGALLAY, J.A.:—My understanding of the section has been the same.]

We submit that if the nature of the mischief to be remedied is looked at, a wider operation must be given to that section. Where a suit was rendered necessary simply by a *bonâ fide* dispute on a question of title, the contract not being in dispute, and neither party having any intention to refuse to do what he is by law bound to do, the proceedings up to the hearing were mere matters of form, and the fair view of the section is that it intended to put the parties in the same position as to investigation of the title in Chambers, as if a reference as to title had been made in a suit for specific performance.

[JAMES, L.J.:—Could you, under such a reference, enter into evidence by affidavit as to matters of fact?]

We apprehend that we certainly could.

[JAMES, L.J.:—Have you any authority for that?]

[*Colt, amicus curiæ*, referred to *Phillipson* v. *Gibbon* (1).]

Davey, Q.C., and *H. C. Deane*, for the vendor.

THEIR LORDSHIPS held that the whole evidence was admissible, and it was accordingly read.

Davey, Q.C., and *H. C. Deane*, were not called on as to the merits.

Judgment, James, L.J.

JAMES, L.J.:—

I think that the vendors have given abundant evidence of their title to the freehold of the heath land, and that the order of the

(1) Law Rep. 6 Ch. 428.

C. A. 1877 *In re* BURROUGHS, LYNN, AND SEXTON.

Judgment, James, L.J.

Master of the Rolls, so far as regards the declaration contained in it, must be affirmed; but in one respect my opinion differs from his. I do not know whether his Lordship thought that the evidence was of such a nature as to be inadmissible, having regard to the mode in which the requisitions had been made and to the mode in which they had been answered, but, in my judgment, it ought to have been admitted. My opinion is that, upon the true construction of this Act of Parliament, whatever could be done in Chambers upon a reference as to title under a decree where the contract was established, can be done upon proceedings under this Act, and that what this Act has done is this: it has enabled the parties to dispense with the form of a bill and answer, and at once to put themselves in Chambers in exactly the same position in which they would have been, and with all the rights which they would have had under the old form of decree. The order, therefore, must be varied by entering this evidence as read, and omitting the clause relating to its rejection.

Mellish, L.J. MELLISH, L.J.:—

I entirely agree in that construction of the Act.

Baggallay, J.A. BAGGALLAY, J.A.:—

I am also of the same opinion.

Solicitors: *Morley & Shirreff; Last & Sons.*

Applied. DOLLFUS MIEG, ETC. *v.* BANK OF ENGLAND. [1949] 1 All E.R. 946.

Referred to. DOLLFUS MIEG CASE. [1949] 1 Ch. 369

TWYCROSS *v.* DREYFUS.

C. A.
1877
V.-C. H.
March 6, 7.
C. A.
April 18.

[1876 T. 177.]

Jurisdiction—Bonds of Foreign Government—Application for Payment out of Assets in England—Principal and Agent—Fiduciary Relation.

The Plaintiff was the holder of bonds at 6 per cent. interest issued by a foreign republic through the Defendants, who were their agents in *England*, by which the foreign republic, upon the national faith, pledged the general revenue of the republic, and especially the free proceeds of the guano imported by the republic into the *United Kingdom*, after the engagements contracted on them were covered, and bound itself in all the contracts which it might enter into for the sale of the guano to set aside in each half year a sum sufficient for the service of the half year, and after such service was secured, to dispose freely of the surplus. The Plaintiff brought an action on behalf of himself and all other holders of the bonds, stating in his claim that the republic had from time to time forwarded to the Defendants large quantities of guano for the purpose of paying the interest on the bonds, which they refused to apply for that purpose, and threatened to apply in satisfaction of a lien claimed by themselves; and he claimed a declaration that he and the other bondholders had a claim upon the proceeds of the guano in priority to any claim by the Defendants. He also alleged that the foreign republic made no claim to the proceeds of the guano, but offered to make it a party if it should so desire.

The Defendants demurred to the statement of claim, on the ground that the Plaintiff had no charge on the proceeds of the guano, and also on the ground of want of jurisdiction and want of parties :—

Held (affirming the decision of *Hall*, V.C.), that no fiduciary relation was alleged between the Defendants and the Plaintiff; that the guano being the property of a foreign government, the Court had no jurisdiction to attach it or the proceeds of the sale thereof; and that the Defendants, being agents of the foreign government, could not be sued in the absence of their principal.

The demurrer was therefore allowed.

DEMURRER.

Statement.

The claim was filed by *James Twycross*, on behalf of himself and all other the holders of the bonds of the Republic of *Peru* forming the 6 per cent. loan of 1870, against Messrs. *Dreyfus Brothers & Co.*, Messrs. *J. H. Schröder & Co.*, and the *Peruvian Guano Company, Limited.*

The statement of claim contained the following allegations :—

In the month of June, 1870, the Defendants, *Dreyfus Brothers*

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& Co., and *J. H. Schröder & Co.*, being the agents of the Peruvian Republic in *London*, issued a prospectus of a loan which the Republic of *Peru* were desirous of raising, bearing interest at 6 per cent.

This prospectus announced the issue by the government, at the price of 82½ per cent., of the sum of £11,920,000 6 per cent. consolidated bonds for the construction of railways, and it contained the following statements:—

The securities specially hypothecated for the due payment of the interest and principal of these bonds are as follows:—

"1. The national credit of the republic, solemnly pledged by the Government of *Peru* in the name of the republic, with the general hypothecation of all its real property and revenue.

"2. The customs dues of the Republic of *Peru*, amounting annually to Soles 4,000,000, or £800,000.

"3. Certain railways therein specially mentioned.

"4. The surplus proceeds of the guano to be imported into the United Kingdom of *Great Britain and Ireland*, her colonies, to the Continent of *Europe*, and to the *United States of America*, after providing for the service of the existing 5 per cent. government loan of 1865 (of which £7,199,200 is still in circulation), and of the guaranteed *Pisco Sea Railway* loan of £290,000. The sale of guano amounts to 55,000 tons per annum, producing a net revenue of about £440,000."

On the faith of the statements in the prospectus the Plaintiff applied for and purchased several of these bonds, and paid for them the sum of £3,256 12*s.* 6*d.* Each of these bonds was executed on behalf of the Republic of *Peru*, and was signed by Don *Toribio Sanz*, the financial agent of the government.

On each of these was printed a statement of the conditions on which the bonds were granted, of which the following were referred to in the argument as material:—

"6. As a guarantee for the fulfilment of the obligations contained in this bond, the Government of *Peru*, under the national faith, pledges the general revenue of the republic, and especially the free proceeds of the guano in *Europe* and *America*, after the engagements which it has contracted on them are covered, the proceeds of the railways from *Areququa* to *Puno*, &c., and the free

revenue of the working thereof and the receipts of the custom houses of the nation."

"8. In all the contracts which the government may enter into for the sale of guano, or under whatever form this sale may be, it binds itself that there be set aside out of the funds of each half year a sum sufficient for the service of that same half year and after such service being secured, to dispose freely of the surplus."

Interest was duly paid by the republic on the bonds till the 1st of July, 1875, but since that date no interest had been paid, nor any part of the principal of any of the bonds.

The 9th paragraph of the statement was as follows:—

"Since the issue of the bonds, the republic has from time to time forwarded to each of the Defendants large quantities of guano for the purposes of, thereby or thereout, or out of the proceeds of sale thereof, paying the unpaid interest on and the amortization of the said bonds. This guano was part of the guano mentioned in the said prospectus and bonds as forming part of the security to the said bondholders for the payment of their principal and interest; and this guano, or the proceeds of the sale thereof in the hands of the Defendants respectively became applicable and ought to have been applied by the Defendants in the first place in or towards payment of the unpaid interest on the said bonds."

It was further stated as follows:—

The Defendants had sold part of the guano so forwarded to them, but still retained large portions in their possession in *England;* but they refused to apply any part of the guano still in their possession or the proceeds of such part as had been sold towards payment of the unpaid interest on the bonds.

The Defendants claimed a charge or lien on the guano and its proceeds, and threatened to appropriate such guano and proceeds to their own use; the Plaintiff was unable to ascertain how they had acquired such charge or lien; but he alleged that such charge or lien (if any) was subject to the rights of the Plaintiff and other holders of the bonds.

The Plaintiff was willing and offered to make the Republic of *Peru* a party to the action, if the republic should so desire, and had given notice thereof to the republic. The said republic, how-

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Statement.

ever, made no claim to the said guano, moneys, funds or securities, or any part thereof, or to any interest therein.

The Plaintiff claimed to have it declared that he and all other the holders of the bonds had a first charge on the said guano, moneys, funds, and securities then in the hands of the Defendants in priority to any claim by the Defendants, and to have the bonds enforced, as the Court might think just.

The Defendants, *Dreyfus Brothers* and *J. H. Schröder & Co.*, demurred to this statement of claim on the ground that the matters in question were none of them within the jurisdiction of the Court; that the Plaintiff, and those upon whose behalf he sued, had no such charge on the guano, moneys, and securities mentioned in the statement of claim (if any such there were) as could be enforced, or have effect given thereto by this Court; or, at all events, no such charge as could be enforced or have effect given thereto in the absence of the Republic of *Peru*, which was a necessary party to the action, and a sovereign power over which the Court had no jurisdiction.

They also put in a statement of defence in which, among other things, they denied that they had received any guano for the purpose of paying the interest of the bonds thereout or out of the proceeds of the sale thereof.

The demurrer was set down for argument before Vice-Chancellor *Hall*, and came on for hearing on the 6th of March, 1877.

Argument.

Davey, Q.C., and *Ingle Joyce*, for the Defendants, in support of the demurrer:—

This is an action for attaching the property of the republic, and, as such, cannot be maintained. There is no fiduciary relation between the Defendants and the Plaintiff with respect to this property or the proceeds of it, as there was in *Larivière* v. *Morgan* (1). There is no allegation in the claim that the Defendants have constituted themselves trustees for the Plaintiff, nor anything to shew such a relation. This case is not distinguishable from *Smith* v. *Weguelin* (2). If there had been anything amounting to an equitable assignment of the guano, the Court could have exercised jurisdiction over the fund, because it had ceased to be the pro-

(1) Law Rep. 7 H. L. 423. (2) Law Rep. 8 Eq. 198.

perty of the Peruvian Government; but there has been nothing of the kind, and so long as it remains the property of the foreign government this Court has no power over it. *Gladstone* v. *Musurus Bey* (1); *Gladstone* v. *Ottoman Bank* (2). The Defendants are simply agents of the Peruvian Government, and this Court cannot grant relief against them when it cannot reach their principal: *Goodwin* v. *Robarts* (3).

But, independently of the question of jurisdiction, these bonds really create no charge in favour of the bondholders on the property mentioned in them. They pledge the national credit and revenues, and the surplus proceeds of the guano after the engagements to which they are subject are paid. There is no pledge of anything till it comes into the hands of the government itself, and it would be impossible for this Court to enforce such a contract against a foreign government.

Hastings, Q.C., and *Romer*, for the Plaintiff:—

The case made by our statement of claim is, that there is a fund within the jurisdiction of the Court, which is in possession of the Defendants, and which was placed in their hands expressly for the purpose of paying the Plaintiff and those whom he represents that which is due to them. We also allege that the foreign government makes no claim to the fund; it has therefore nothing more to do with it; and the only claimants to the fund are the bondholders and the Defendants, who themselves claim a lien on it. Both of these parties are amenable to the jurisdiction of the Court. Why should not the Court determine the question between them? The Defendants say this is a claim to attach the property of the republic. That is not the case. Our contention is that the fund is not the property of the republic, but the property of the Plaintiff; and it is sufficiently alleged in the statement that the republic makes no claim to it. *Smith* v. *Weguelin* (4) has no application to this case. This is a case in which a fund in this country has been set apart in trust for the Plaintiff, and a fiduciary relation has been imposed upon the Defendants as in *Lariviere* v. *Morgan* (5). The observations of Lord Chancellor

(1) 1 H. & M. 495. (3) Law Rep. 10 Ex. 337.
(2) Ibid. 505. (4) Ibid. 8 Eq. 198.
(5) Law Rep. 7 Ch. 550; Ibid. 7 H. L. 423.

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Argument.

Hatherley at the hearing before him (1) are particularly applicable, when he says: "I will put the case of a foreign government having placed in this country a sum of money and having charged it with certain trusts to be performed, subject to which the balance is to be paid back to the foreign government. Is it possible to say that in such a case the trustee is not liable to perform the trust, because the foreign government, one of the *cestuis que trust*, cannot be made to appear?" That is precisely the state of things here. If the republic make no claim, the Court may distribute the fund to those who claim it. In *Stevenson* v. *Anderson* (2) where a banker paid into Court a fund claimed by several persons, some of whom were out of the jurisdiction and made no claim, Lord *Eldon* ordered it to be paid to those who did appear and claim it.

Judgment, V.-C. H.

HALL, V.C.:—

I must allow this demurrer.

The case has been very ably argued in support of the statement of claim by Mr. *Graham Hastings* and Mr. *Romer*. Mr. *Graham Hastings* passed rather rapidly down to the 9th paragraph of the statement of claim. But it is impossible to deal with one isolated paragraph of this statement of claim; it must be taken as a whole.

The statement of claim states a case on behalf of Mr. *Twycross* himself and all others the holders of the bonds of the republic forming a portion of the loan of 1870. The Defendants are Messrs. *Dreyfus Brothers & Co.* and Messrs. *Schröder & Co.*, and the *Peruvian Guano Company, Limited*. The exact position of each of these Defendants is not very clearly defined upon that statement of claim; but I must take it, I think, upon the statement of claim that the position of each of these parties is that of an agent, or, at all events, as regards Messrs. *Dreyfus Brothers & Co.* and *Schröder & Co.*, that they are the agents of the Peruvian Government. That, I think, is the proper conclusion.

Now, the position of the Plaintiff and those whom he seeks to represent is that of creditors of a foreign government. They have subscribed to a loan raised, or partially raised, by a foreign govern-

(1) Law Rep. 7 Ch. 560. (2) 2 V. & B. 407.

ment in this country. Passing by for a moment any specific claim which is made upon the guano, the case of a foreign government contracting a loan is one which apparently cannot be properly the subject of an action at all. This is observed by Mr. Justice *Blackburn* in the case of *Crouch* v. *Crédit Foncier of England* (1). There the question was not that which is now being considered; but in reference to such contributors to a foreign loan, he makes this observation (2): "Foreign and colonial governments frequently create a public debt, the title to portions of which is by them made to depend on the possession of bonds expressed to be transferable to the bearer or holder. There can hardly properly be said to be any right of action on such instruments at all, though the holder has a claim on a foreign government." I need not say that in this case an action upon the bond against the Republic of *Peru* for recovering from the republic the amount of the bond is entirely out of the question. No such action as that could be maintained.

Then, considering that as the original position of each of the Plaintiffs, what is there beyond which it is important to consider? There is a prospectus set out, upon the faith of which the Plaintiff says he subscribed. But the actual instrument (if it be an instrument, which can be described properly as amounting in any way to a contract) is what is called the "statement" which accompanies each of these bonds. That is set out in the 7th paragraph of the statement of claim, and the position of the bondholders is there defined. There are certain special provisions as to the amortization fund by which the bonds were to be paid in a certain order. It is in itself a matter of difficulty to know exactly how that could be dealt with under any application to this Court as regards any fund which might be considered under its control. But passing to the 6th clause of that statement, what is the foundation of the present claim? It is this: The clause says that "as a guarantee for the fulfilment of the obligations contracted in this bond, the Government of *Peru*, under the national faith, pledges the general revenue of the republic, and especially;" then it gives details of certain particulars of revenue, amongst which we find, "the proceeds of the guano in *Europe* and *America*, after the engage-

(1) Law Rep. 8 Q. B. 374. (2) Law Rep. 8 Q. B. 384.

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Judgment, V.-C. H.

ments which it has contracted upon them are covered." Then it mentions certain railways and the free revenue of the working thereof, and the receipts of the custom-houses of the nation. That is to say, it is a general engagement that the whole revenue of the republic is pledged for this loan, and especially the free proceeds of the guano after the engagements which it has contracted upon them are covered, and the like as to the railways and the free revenue of the working thereof. Then it is provided by the 8th clause: "In all the contracts which the government may enter into for the sale of guano, or under whatever form this sale may have, it binds itself to direct that there be set aside out of the proceeds of each half year a sum sufficient for the service of that same half year, and after such service being secured, to dispose freely of the surplus." I understand that "the service of the half year" means, or includes, the engagements which are referred to in clause 6. The nature of the government contract (if it be a contract) is, that the government contracts or engages to direct that a sum shall be set apart for the service of the year, and stipulates that it may dispose freely of the surplus. That is to say, as I read it, it is to be an act of appropriation and application of the fund by the government itself. The bondholder, the person who has the benefit of this engagement, is to go to the government and say, "You have engaged that after certain payments have been made, you will, out of what may be in your hands applicable for the purpose, set aside a sum sufficient for the service out of it."

Then in the latter part the government engage that the proceeds of the guano expressly hypothecated, the value of the railways, the product thereof, as also the imports of the customs, shall be applied in their order to the payment of the capital and interest of the said loan to the end that these be always paid. What exactly is meant by that I do not know. There is an ambiguity about that "be applied in their order," because there is no order before described as to the application. Whether it means the order in which they are mentioned I do not know, but there is no order specified in which they are to be applied.

Then the statement of claim alleges in paragraph 9, "Since the issue of the said bonds up to the present time the said republic has from time to time forwarded to each of the Defendants, and

the said Defendants have respectively received large quantities of guano for the purposes of thereby or thereout, or out of the proceeds of sale thereof, paying the unpaid interest on, or the amortization of, the said bonds." That clause is either ambiguous, and therefore should be read against the pleader, as I read it, or it is not ambiguous, and should equally be read as I read it. As I read the clause it is, that there has been forwarded to each of the Defendants by the republic guano for the purpose of sale, "and for the purpose of thereby or thereout paying." That is, they have done that for the purpose of their paying; that is, the government paying. It is not that the persons to whom the guano is sent are to do that. They are not appointed agents for the purpose of doing that at all. There is no doubt the government might give directions to those agents to do it. But what is supposed is this (and that is in harmony with the 6th and 8th clauses of the statement which accompanies the bond), that the government send to certain persons in *England* guano to be sold, and send it in order that they, the government, may, when it has been sold, apply it in a particular way. But it is to be applied by the government, and not by the agents. Then the same paragraph states, "This guano was part of the guano mentioned in the said prospectus and bonds as forming part of the security of the said bondholders for the payment and interest due to them on their said bonds, and this guano, or the proceeds of the sale thereof, in the hands of the said Defendants respectively, became applicable, and ought to have been applied by the said Defendants respectively, in the first place, in or towards payment of the unpaid interest due on the said bonds." I do not find anything, in my reading of the prospectus and bond, to shew that it did "become applicable and ought to have been applied by the Defendants." They may have had a separate agency and instructions for the purpose of doing so; that I do not know anything about; but that would be something separate and distinct from anything which is alleged in this paragraph. Then, independently of that, I take it that clearly upon this statement it was sent to them as agents of the republic. Everything that they were to do was to be done by them, I conceive, as agents. It is not sent to them as a fund to be treated and set apart and dealt with as a fund in their hands, so as to create any relation

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whatever between them and the bondholders. There is no trust impressed upon it—no equitable assignment created by the transaction which is there represented—taking it to be truly represented. Therefore, that being so, there is neither trust nor equitable assignment in the case, and it does not even approach the case of *Gladstone* v. *Musurus Bey* (1), where there was a sum actually deposited by actual contract for a special and particular purpose between the parties, and which sum the Court thought it could deal with. The observations of the Lord Chancellor in *Larivière* v. *Morgan* (2) with reference to that and other cases would seem to shew that he considered that apparently under such circumstances as those in *Gladstone* v. *Musurus Bey* it might be considered that there was something amounting to a trust. I cannot find any allegation whatever in this statement of claim that amounts to an assignment or trust, or anything which changed the property in any way in the guano or in the proceeds of sale. There was no interest in reality in the guano as such in the bondholder, his only interest under this statement was in the proceeds of sale of the guano, and not in the guano itself.

That being so, and there being no trust, no equitable assignment, it would seem that the case of *Larivière* v. *Morgan* is a very formidable difficulty in the way of the Plaintiff in this case, because the Lord Chancellor there and the other Judges seem to have considered that it was essential, for the purpose of giving the Plaintiff there any interest in the fund itself, that there should be a trust or equitable assignment, and that subject to that it remained under the dominion of the owner.

But it seems to me that, even if the contract be treated in all respects as a contract between two individuals (which is perhaps putting the case too high in favour of the Plaintiff), seeing that it is merely a declaration by a foreign government as to what it means to do with certain portions of its revenue, the substance of it was that the party was only to get payment through the means of the application made by the foreign government itself of the proceeds of the sale of the guano. That was to be his only remedy, and not to impound or attach the guano itself, or the proceeds happening to be by mere accident in the hands of an agent of the

(1) 1 H. & M. 495. (2) Law Rep. 7 H. L. 423.

foreign government. That appears to me to go to the substance of the Plaintiff's case.

Then it is said that the government does not make any claim at all to the guano, but leaves the disputes as to interest, and so on, to be considered and determined and fought out as between the rival claimants, the Plaintiff, and the Defendants, who, it is asserted in the statement of claim, claim and must be taken to claim, an interest in it themselves—to have a charge or lien in preference to the Plaintiff, while the government leaves that to be fought out between them without the principal being here at all. It seems to me to be clear that in this state of things the persons to whom this guano was consigned are not in the position of principals, and liable to be attached as such at all. The government are the principals, notwithstanding the statement which is put into the clause, that "they do not claim an interest in the guano, moneys, funds, securities, or any part thereof, or any interest therein." But still, though they may not claim it, I cannot, because it is in the hands of an agent, treat the agent's property and interest in it as being any other than that of the government itself. Therefore I do not think the Plaintiff is entitled to put his case in any other way than as if he were to say, "The government have got a certain sum at their bankers, who may be in *London;* they consider the fund properly forming part of their exchequer for the purpose of paying these sums out of it, they do not make any claim to it, we will therefore have an action in order to claim it, and we will ascertain in the absence of the principal how much is due to us, and how much is due to others, what other claims there may be upon it—we will have all determined in an action without the presence of the principal debtor."

I hold that this cannot be done, that it is essential in a case of this kind that the principal debtor should be here, even though he may have said, "I do not make any claim to this fund." I say so, because, looking at the nature of the contract, and engagement to pay, I do not think there is that which amounts to an equitable assignment or trust, or that anything has been done to divest the property out of the Republic of *Peru*, so as to enable this Court to deal with it without having before it the person entitled to that property, to which, as I read the claim, he is a necessary party,

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notwithstanding there may be other demands which may exhaust the whole of it. They may have an interest in seeing that the fund is properly dealt with, and in reference to the continuance of and proceedings in the action which has been instituted by this Plaintiff. Therefore it seems to me, upon those grounds, this demurrer is one that goes to the root of the Plaintiff's case, and must be allowed with costs.

Hastings asked for leave to amend the statement of claim to remove the ambiguity in the 9th paragraph, in the words "for the purpose of paying."

HALL, V.C.:—No; I shall not allow any amendment.

C. A. From this decision the Plaintiff appealed. The appeal was heard on the 18th of April.

Hastings, Q.C., and *Romer*, for the Appellant, followed the same line of argument as in the Court below.

Davey, Q.C., and *Ingle Joyce*, for the Defendants, were not called on.

Judgment, C. A. Jessel, M.R.

JESSEL, M.R.:—

The first and most important point we have to decide is what the meaning of the bond of a foreign government given to secure the payment of a loan is. As I understand the law, the municipal law of this country does not enable the tribunals of this country to exercise any jurisdiction over foreign governments as such. Nor, so far as I am aware, is there any international tribunal which exercises any such jurisdiction. The result, therefore, is that these so-called bonds amount to nothing more than engagements of honour, binding, so far as engagements of honour can bind, the government which issues them, but are not contracts enforceable before the ordinary tribunals of any foreign government, or even by the ordinary tribunals of the country which issued them, without the consent of the government of that country. That being so, it appears to me that the bond in question confers no right of action on the Plaintiff, and on that ground it seems to me it follows that the demurrer ought to be allowed.

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But I wish to say a word or two as to the special circumstances of the case. First of all a prospectus is set out which contains certain statements of what is about to be hypothecated, but the prospectus stated also that bonds would be issued. Bonds were issued and accepted by the subscribers to the prospectus, and those bonds stated in a definite way, under seal of the financial agent of the Republic of *Peru*, the terms on which the loan was issued. It appears to me that after that there was an end of the prospectus. *A fortiori* that observation applies with respect to all bonds purchased in the market by persons who had nothing whatever to do with the prospectus. I think they are all in the same position as to that. Now, what does the bond offer to them? In my opinion, rightly construed, and having reference to the nature of the government which issued it, it did not amount to what, as regards a private individual, could be treated as a mortgage. It says, "As a guarantee for the fulfilment of the obligations contracted in this bond, the Government of *Peru*, under the national faith" (that means the national honour, the national faith in the sense of good faith), "pledges the general revenue of the republic, and especially the free proceeds of the guano in *Europe* and in *America*, after the engagements which it has contracted on them are covered," and other property. What is the meaning of the word "engagement"? First of all, everybody knows that the first engagement a government contracts to pay out of its own revenues is the engagement necessary to continue its own existence as a government to pay for its military and civil services to any extent the government thinks necessary. How can any rational person call that a mortgage or pledge which is preceded by the right of the pledger to appropriate as much of the property as he pleases to any purpose he thinks desirable for his own use? It is impossible to look upon that seriously as a pledge. It is so much as the government chooses to leave them after satisfying the ordinary engagements and wants of the government. Then there is another stipulation that in all the contracts which the government may enter into for the sale of guano, or under whatever form this sale may have, it binds itself to direct that there be set aside out of the proceeds of each half year a sum sufficient for the service of that same half year, and after such service being secured, to

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dispose freely of the surplus. That is, the government binds itself to direct it. If it does not direct it you have nothing but the national faith to look to or appeal to.

The case beyond that is simply this: It is said the government has sent guano to some agents in *Europe*, who are made Defendants, that these Defendants have sold the guano, that they have notice of the bonds, that they claim some charge or lien on the guano—it is not said what it is, because the Plaintiff does not know and cannot ascertain—and that the republic make no claim. All that is perfectly consistent with this, which for aught I know may be the case, that the Peruvian Government have borrowed money to more than the amount of the proceeds of the guano from these agents, and that the agents are entitled to retain the proceeds in repayment of that loan, and that loan may be a loan contracted by the government for the purpose of satisfying its most pressing wants and needs—wants which must be satisfied in order to secure the existence of the government as such. All that is perfectly reconcilable with these statements. But even if it were otherwise, I think the same result would follow: you cannot sue the agent in the absence of the principal, the principal is the Peruvian Government—you cannot sue the Peruvian Government at all, and, therefore, you cannot sue its agents. There is no question of trusteeship, it is simply a case of agency. I am of opinion that the decision of the Vice-Chancellor was correct, and that it must be affirmed. The appeal will be dismissed with costs.

James, L.J.

JAMES, L.J.:—

I am of the same opinion. It appears to me clear that the Defendants are nothing but agents of the Peruvian Government, and that they fill no other character whatever. They may have, on the balance of account between them and the government, proceeds of guano, or other moneys, available for the payment of the bonds, but that is a matter between them and the Peruvian Government. You cannot sue the Peruvian Government, and it would be a monstrous usurpation of jurisdiction, in my opinion, to endeavour to sue a foreign government indirectly, by making its agents in this country Defendants, and then saying, "You have got the money of the government, and you ought to apply that."

It really would be indirectly endeavouring to make the foreign government responsible to the jurisdiction of this Court.

MELLISH, L.J.:—

I am of the same opinion.

Solicitors for Plaintiff: *Mercer & Mercer.*
Solicitor for Defendants: *G. M. Clements.*

PRICE *v.* JENKINS.

[1875 P. 12.]

Voluntary Settlement—Consideration—Assignment of Leaseholds—Subsequent Purchaser for Value—Settlement on Second Marriage—Limitation in Favour of Son by former Marriage—27 Eliz. c. 4.

A widower, on his second marriage, made a settlement, in which he assigned some leasehold property to trustees, one of whom was his son by a former marriage, upon trust for himself for life, and after his death for his said son. He afterwards contracted to sell the leasehold property to the Plaintiff:—

Held, that the settlement of the leasehold property on the son was not a voluntary conveyance under the 27 Eliz. c. 4, on the ground that the assignment of leasehold property to which liability is attached is, in itself, a conveyance for valuable consideration.

Whether the settlement was also for valuable consideration as regarded the son, on the ground that the consideration of the second marriage extended to him—*Quære.*

The decision of *Hall*, V.C., reversed.

THIS was an appeal from a decision of Vice-Chancellor *Hall* (1).

The action was brought by *Margaret Price* for specific performance of a contract, dated the 16th of November, 1874, by which *Thomas Jenkins* the elder agreed to sell a leasehold house called the *Bruce Hotel*, at *Pant*, near *Merthyr Tydvil*, to the Plaintiff, for £200.

In the first instance, *Thomas Jenkins* the elder was the only Defendant, but it appeared that his son, *Thomas Jenkins* the younger, claimed an interest adversely to his father, and he was accordingly, by the direction of the Court, made a Defendant.

(1) 4 Ch. D. 483.

C. A. 1877 PRICE v. JENKINS. Statement.

Thomas Jenkins the younger was a son of the original Defendant by his first marriage. The property the subject of the contract belonged to *Thomas Jenkins* the elder for a term of years at the time of his second marriage, which took place in May, 1864; and by a settlement dated the 17th of May, 1864, and made in contemplation of the second marriage, it was assigned to two trustees, of whom *Thomas Jenkins* the younger was one, in trust, after paying all outgoings, for *Thomas Jenkins* the elder, during his life, and after his death for his son *Thomas Jenkins* the younger, absolutely. The intended wife's property was also settled by the same deed upon her and her children. The settlement contained no covenant by the trustees to pay the rent or perform the covenants of the lease under which the premises were held.

The Plaintiff contended that the settlement made on the second marriage of *Thomas Jenkins* the elder was voluntary, so far as related to his son by his former marriage, and was void against the Plaintiff under the 27 Eliz. c. 4.

Thomas Jenkins the elder also set up a defence that the contract was void by reason of his being drunk when he signed it. But the Vice-Chancellor held that this defence was not established.

The Vice-Chancellor was, however, of opinion that *Thomas Jenkins* the younger was a volunteer under the settlement on the second marriage of his father, and that the settlement was void as against the Plaintiff, and accordingly granted specific performance of the agreement.

From this decision the Defendants appealed.

Argument.

Morgan, Q.C., and *Maclean*, for the Appellant:—

The consideration for the settlement on the second marriage extended to the son by the former marriage. It was a bargain between all parties which was cemented by the marriage.

[JAMES, L.J.:—Can an assignment of leasehold property ever be, strictly speaking, voluntary? I remember a case in my own practice at the bar, which is not reported, in which the owner of three leasehold houses made a promise on his deathbed to give one of them to his widow; and the executor accordingly signed a written agreement to assign one of the houses to the widow, she undertaking to pay an apportioned rent of one guinea to the ground

landlord and performing the covenants of the lease. I advised that this was a *nudum pactum*, but it was held by Vice-Chancellor *Shadwell* to be an agreement for valuable consideration.]

Argument.

Dickinson, Q.C., and *Freeling*, for the Plaintiff, were called on upon this particular point:—

Each assignment of leaseholds must depend on its own circumstances. In the case referred to by the Lord Justice there was a valuable consideration in the payment of the apportioned rent; but in the present case no such consideration is alleged, nor is it shewn that any liability attached to the trustees under the assignment. On the contrary, the first trust is to satisfy all outgoings before the trustees paid anything to the *cestuis que trust*. There must have been many cases of assignments of leaseholds which have been called in question under the statute of *Elizabeth*, but there is no reported case in which this point has been decided or taken.

Judgment, James, L.J.

JAMES, L.J.:—

It appears to me impossible to hold that this settlement was voluntary as regarded *Thomas Jenkins* the younger, who was himself one of the assignees of the leaseholds. The trustees came under a responsibility for payment of rent and performance of the covenants of the lease. It might be such a responsibility that a lessee might be actually willing to pay money to get rid of. If there is any valuable consideration for a settlement, the quantum of such a consideration is of no consequence under the statute of *Elizabeth*. I think that here there was a valuable consideration sufficient to support the settlement against a subsequent purchaser. It appears to me impossible to distinguish it from such a case as that to which I referred during the argument. The purchaser's title cannot prevail against the trustees of the settlement. On that ground alone, therefore, I think the bill must be dismissed. But as the charge of fraud has been made by the defence, we must hear the evidence as to the circumstances under which the contract was made before disposing of the costs.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

C. A. 1877 PRICE v. JENKINS.

The evidence as to alleged drunkenness of *T. Jenkins* the elder was then read and commented on.

THE COURT held that there was no ground whatever for the imputation; and, therefore, dismissed the action without costs, either of the hearing before the Vice-Chancellor or of the appeal.

JAMES, L.J., added:—We desire it to be understood that we have expressed no opinion as to the point on which the Vice-Chancellor founded his judgment. That point has not been argued before us, and we give no opinion upon it.

Solicitors: *C. R. James*, agents for *C. F. & G. James, Merthyr Tydvil; Sharp & Ullithorne*, agents for *Simons & Plews, Merthyr Tydvil.*

C. A. 1877 *April* 23.

In re VEALE'S TRUSTS.

Will—Power of Appointment—Children or Issue—Exclusive or Distributive Power.

15 Ch. D. 626

A testatrix bequeathed a fund to her daughter for life, and after her death to and amongst the other children of the testatrix or their issue, in such parts, shares, and proportions, manner and form, as her said daughter should by deed or will appoint:—

Held (affirming the decision of the Master of the Rolls), that the daughter's power was exclusive and not distributive merely.

Statement.

THIS was an appeal from a decision of the Master of the Rolls (1).

Mary Veale, by her will, dated the 18th of August, 1823, bequeathed a sum of £4 per Cent. Bank Annuities and a sum of cash to trustees therein named, upon trust to pay the income thereof respectively to her daughter, *Mary Elizabeth Veale*, for her life, and from and immediately after her decease, if there should be no child or children of the said *Mary Elizabeth Veale* (as was the case), "upon trust to pay and apply all the same trust moneys, and to assign and transfer the security and stock in and upon which the same shall be then invested, to and amongst my other children

(1) 4 Ch. D. 61.

or their issue, in such parts, shares, and proportions, manner and form, as my said daughter *Mary Elizabeth Veale* shall by deed or will direct, limit, and appoint; and in default of such direction, limitation, and appointment, I direct that the same shall fall into and form part of my residuary personal estate." And the testatrix bequeathed all the residue of her personal estate to her son *William Veale.*

Statement.

The testatrix died in 1825, leaving her surviving *Mary Elizabeth Veale,* two other daughters, and a son, *William Veale.*

Mary Elizabeth Veale died on the 18th of January, 1865, having, by her will, dated the 3rd of June, 1856, given the trust fund to her executors therein named upon trust for her niece *Emilia Mary Butler* during her life, and after her death for the use and benefit of any child or children, or issue of any child or children, of her said niece who should be living at her said niece's death, to be equally divided between them, the issue of deceased children taking their parents' shares.

There were living at the death of *Mary Elizabeth Veale* her brother and two sisters, and also three children of one of the sisters, *Emilia Mary Butler* being one of such children, and four children of *Emilia Mary Butler.*

The trust fund, consisting of the sum of £1404 New £3 per Cent. Annuities, having been transferred into Court under the *Trustee Relief Act* by the surviving trustee of the will of *Mary Elizabeth Veale,* a petition was presented by the trustees of the will of *William Veale,* who had died, praying that the fund might be paid out to them, on the ground that *Mary Elizabeth Veale's* will was an invalid exercise of the power given to her by her mother's will, and that, consequently, the fund passed under the residuary clause of the latter will, and became part of the estate of *William Veale,* as in default of appointment.

The Master of the Rolls was of opinion that the power was an exclusive power, and was well exercised by *Mary Elizabeth Veale.*

The Petitioners appealed from this decision.

Argument.

Bagshawe, Q.C., and *Methold,* for the Appellants, contended that the power did not authorize *Mary Elizabeth Veale* to exclude any of the other children or issue of the original testatrix, her power

C. A. 1877 — *In re* VEALE'S TRUSTS. — Argument.

being simply distributive. They followed the same line of argument as at the hearing before the Master of the Rolls, and cited *Routledge* v. *Dorril* (1); *Garthwaite* v. *Robinson* (2); *Stolworthy* v. *Sancroft* (3); *Doe* v. *Alchin* (4); *Dalzell* v. *Welch* (5); *Robinson* v. *Sykes* (6); *Penny* v. *Turner* (7); *Farwell* on Powers (8); *Sugden* on Powers (9).

Davey, Q.C., and *Northmore Lawrence*, for Mrs. *Butler* and her children, were not called on.

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion that the decision of the Master of the Rolls must be affirmed. It is not necessary to go into the authorities fully. We have to decide according to the real meaning of the particular clause in the will. The Court is not bound by any rule of construction which leads to a result contrary to the plain meaning of the testatrix.

Here the testatrix says the fund is to be divided among her "children or their issue." By these words she indicated without doubt that the grantee of the power was to have a choice in dividing it among the family. She says, "You may give it to children or grandchildren." If she was to have a power of selection between the class of children and the class of grandchildren, I think she was meant to have a power of selection between the individuals of such class. I am, therefore, of opinion that the power was well exercised, although some of the objects were excluded, and that the appeal must be dismissed.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *Dalton & Co.; Kendall & Congreve.*

(1) 2 Ves. 357.
(2) 2 Sim. 43.
(3) 10 Jur. (N.S.) 762.
(4) 2 B. & A. 122.
(5) 2 Sim. 319.
(6) 23 Beav. 40.
(7) 2 Ph. 493.
(8) Page 410.
(9) 8th Ed. p. 595.

GALE *v.* SQUIER.

C. A. 1877 April 23.

[1876 G. 96.]

Vendor and Purchaser—Conditions of Sale—Sale subject to Quit Rents—Form of Conveyance.

Trustees for sale who sold under a condition that "the property is sold and will be conveyed subject to all free rents, quit rents, and incidents of tenure, and to all rights of way, water, and other easements, if any . . . . without any obligation on the vendors to define any such rights or claims":—

Held (affirming the decision of *Bacon*, V.C.), entitled to have a saving in general terms inserted in the habendum of the conveyance, although it was not shewn or asserted that the property was subject to any of the liabilities so specified.

Statement.

THIS was an appeal from a decision of Vice-Chancellor *Bacon* (1).

The Plaintiffs were trustees for sale of a freehold house and two cottages and gardens in the parish of *Laindon, Essex*, and on the 26th of June, 1876, they put up this property to auction, with other lots, under conditions of sale of which the following was one:—

"The property is sold and will be conveyed subject to all free rents, quit rents, and incidents of tenure, and to all rights of way, water, and other easements (if any), and to all liability to make and maintain roads or fences, or other liabilities of a like nature, and to all existing tenancies thereof, and all rights and claims of what kind and nature soever (if any) of the tenants, without any obligation on the part of the vendors to define any such rights or claims."

At the sale the Defendant *Squier* became the purchaser, the title was accepted, and the Defendant's solicitor prepared the draft of the conveyance. The Plaintiffs' solicitor desired the insertion of the following words in the habendum: "Subject to all free rents, quit rents, and incidents of tenure, and to all rights of way," &c., following the words of the conditions of sale. The Defendant's solicitor objected to the insertion of the words, on the

(1) 4 Ch. D. 226.

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ground that the vendors had not shewn that any such liability existed.

The Plaintiffs accordingly brought this action, claiming specific performance of the contract.

Statement.

Vice-Chancellor *Bacon* held that the Plaintiffs were entitled to insist on the words being inserted, or else that the Defendant should sign a letter to the effect that the omission of the words should not be regarded by the purchaser as a waiver of the condition, which letter the vendors had offered to accept before the commencement of the action. The Defendant appealed from this decision.

Argument.

Nalder (Sir *H. Jackson*, Q.C., with him), for the Defendant, contended that if the condition had been in the ordinary form, that "the property is sold subject to all chief and other rents, rights of way and water," &c., according to the ordinary practice of conveyancing, the Plaintiffs would not have been entitled to insist on those words being inserted in the habendum, and that the addition of the words "and will be conveyed" made no difference; the effect of the insertion of the words would be to raise a question on the title in case of a resale.

Herbert Lake (*Kay*, Q.C., with him), for the Plaintiffs, was not called on.

Judgment.

JAMES, L.J.:—

There is no ground for this appeal. It must be dismissed with costs.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *E. Woodard; Lake, Beaumont, & Lake.*

KING *v.* GEORGE.

C. A. 1877 April 24.

[1876 K. 193.]

Will—Construction—General Bequest—Articles specifically enumerated—Ejusdem Generis.

A testatrix made her will in these words: "I, *S. G.*, do bequeath to *A. K. G.* all that I have power over, namely, plate, linen, china, pictures, jewellery, lace, the half of all valued to be given to *H. G.* The servants in the house who have been a year with me to receive £10, and clothes divided among them, also all kitchen utensils." The testatrix had considerable personal estate:—

Held (affirming the decision of *Malins*, V.C.), that the whole personal estate passed by the will.

Statement.

THIS was an appeal from a decision of Vice-Chancellor *Malins*.

Sarah George made her will, dated the 25th of May, 1874, as follows:—

"I, *Sarah George*, do bequeath to *A. K. George* all that I have power over, namely, plate, linen, china, pictures, jewellery, lace, the half of all valued to be given to *Herbert George*, son of *Frederick George*. The servants in the house who have been with me a year to receive £10, and clothes divided among them, also all kitchen utensils."

The testatrix died possessed of considerable personal estate. The Plaintiffs were her next of kin, and claimed all of it except the articles mentioned in the will, and things *ejusdem generis* with them. The Vice-Chancellor held that the whole personal estate passed by the will (1). The Plaintiffs appealed.

Argument.

Glasse, Q.C., and *Cary*, for the Appellants:—

There must be some exception out of the first bequest in the will; the testatrix did not intend it to include everything, for she afterwards proceeds to dispose of things which the former words, if taken in the unrestricted sense, would have disposed of. *Timewell* v. *Perkins* (2) is directly in point, and *Wrench* v. *Jutting* (3),

(1) 4 Ch. D. 435. (2) 2 Atk. 102.
(3) 3 Beav. 521.

C. A. 1877 KING v. GEORGE. Argument.

In re Kendall's Trusts (1), *Rawlings* v. *Jennings* (2), and *Enohin* v. *Wylie* (3) support the restricted construction, that the will only disposes of articles *ejusdem generis* with those mentioned. *Bridges* v. *Bridges* (4) is the other way. The Vice-Chancellor admitted that this case and *Timewell* v. *Perkins* (5) were irreconcilable, and held that the former ought to be followed by reason of the decision in *Dean* v. *Gibson* (6), but that case does not govern the present. You may adopt the view that the particulars mentioned are an imperfect enumeration where they are leading particulars, such as would readily occur to the mind of a testator who wished to state the particulars of which his personal estate consisted, but it is against reason to apply that principle to a case where only some of the most trifling particulars are mentioned.

[*Chalmers* v. *Storil* (7) was also referred to.]

J. Pearson, Q.C., and *Rigby*, for the Respondents :—

The words are enough to pass all to *A. K. George*, but the testatrix does not intend him to keep all, she goes on to mention what he is to hand over to other people. The latter part of the will, therefore, need not be construed as detracting from the generality of the former. There is here an imperfect enumeration; every word of the judgment in *Dean* v. *Gibson* applies.

[MELLISH, L.J. :—Can you treat words as an imperfect enumeration which omit all the important items of personal estate?]

It may be urged, on the other hand, if she meant to dispose only of these trifling particulars, why did she begin with words wide enough to include everything. The words cannot be cut down without clearer proof of intention. *Wrench* v. *Jutting* (8) went on a second gift in the will to the same person, which was held to restrict the first; and *Re Kendall's Trusts* is in our favour.

Cary, in reply.

Judgment, James, L.J.

JAMES, L.J. :—

I am of opinion that the decision of the Vice-Chancellor must

(1) 14 Beav. 608.
(2) 13 Ves. 39.
(3) 10 H. L. C. 1-17.
(4) 8 Vin. Ab. 295.
(5) 2 Atk. 102.
(6) Law Rep. 3 Eq. 713.
(7) 2 V. & B. 222.
(8) 3 Beav. 121.

be affirmed. It is in my judgment impossible even to form a probable conjecture which of the two views urged upon us expresses the real intention of the testatrix; but she begins with plain words, "I bequeath to *A. K. George* all that I have power over," which, as the Vice-Chancellor says, are equivalent to "I give to *A. K. George* all my real and personal estate." If those words stood alone they would pass everything she had. The question is, whether the words, "namely, plate, linen, china, pictures, jewellery, lace," enable us to see our way clearly to confining the gift to a gift of these and similar articles. I think that apart from authority I should have had difficulty in coming to the conclusion that they do. I think the law is correctly laid down by the Vice-Chancellor when he says: "I cannot help thinking that the doctrine has been settled that where a testator gives his property generally by the words, 'all my property,' or 'all my estate,' or 'all that I have power over,' as in this case, where he uses words sufficient to pass everything, and then proceeds to enumerate particulars—it is now, I think, pretty well settled that an enumeration of particulars does not abridge or cut down the effect of the general words." It is urged that this rule ought not to be applied here, because the enumeration is only an enumeration of minute things and not of the chief descriptions of personalty. If we were to decide on that ground our decision would tend to this result, that in each case it must be considered whether the testator has inserted more than he has left out, or left out more than he has inserted. It is safer to adhere to the general rule that clear words of gift must have their full effect unless a clear intention is shewn to cut them down. I do not regret coming to this conclusion, as I have no reason to suppose that it defeats the real intention of the testatrix, for I am unable even to guess what that intention was.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *H. Hill; Druce, Sons, & Jackson.*

C. A.
1877
April 24.

TEASDALE *v.* BRAITHWAITE.

[1875 T. 68.]

Husband and Wife—Post-nuptial Settlement—27 Eliz. c. 4—Precatory Trust—Valuable Consideration.

Real estate was devised to a single woman with a declaration of a wish that if she should marry she would before marriage settle it to her separate use for life and to such uses as she should by will appoint. She married without a settlement, and afterwards, by an acknowledged deed expressed to be made for giving effect to the testator's wish, the husband and wife conveyed the land to trustees during the life of the wife upon trust for her for her separate use without power of anticipation, and after her death to the use of the husband for life, with remainder to their children as therein mentioned. Subsequently the husband and wife mortgaged the property without notice of the settlement:—

Held (affirming the decision of *Bacon*, V.C.), that the settlement was for valuable consideration, and not void as against the mortgagee under statute 27 Eliz. c. 4.

Statement. THIS was an appeal by the Plaintiff from a decision of Vice-Chancellor *Bacon* (1).

Argument. *Ince*, Q.C., and *Shebbeare*, for the Appellant:—

There is a trust to settle upon the wife for her separate use for life, and the settlement is expressed to be made for giving effect to the testator's desire. The words are sufficient to create a trust: *Hawkins* on Wills (2); *Cruwys* v. *Colman* (3). This trust does not provide for a restraint on anticipation, and that restraint is void against the Plaintiff. The cases cited below, *Stanley* v. *Jackman* (4) and *Loch* v. *Bagley* (5), as shewing that the Court would, in executing the trust in the will, impose such a restraint, were cases of executory trust. There is no statement of any bargain between the parties, and the settlement is voluntary: *Goodright* v. *Mores* (6); *Currie* v. *Nind* (7); *Butterfield* v. *Heath* (8); *Hewison* v. *Negus* (9).

(1) 4 Ch. D. 85, where the facts will be found.
(2) Page 159.
(3) 9 Ves. 319.
(4) 23 Beav. 450, 456.
(5) Law Rep. 4 Eq. 122.
(6) W. Bl. 1019.
(7) 1 My. & Cr. 17.
(8) 15 Beav. 408.
(9) 16 Beav. 594; affirmed by the Lords Justices, 17 Jur. 567.

Sir *H. Jackson*, Q.C., and *W. W. Cooper*, for the Defendants, were not called upon.

C. A. 1877

TEASDALE v. BRAITHWAITE.

Judgment, James, L.J.

JAMES, L.J.:—

The decree in this case must be affirmed. It no doubt often produces hardship that, owing to the want of a general registry, a person who has made a conveyance of land to one person can in this civilized country represent himself as owner and induce another person the next day to accept a conveyance of the same estate. That is the state of the law. In this case it is clear that, except so far as the case is governed or affected by the original will, there was a sufficient consideration moving from the husband to make this not a voluntary settlement within the statute 27 Eliz. c. 4. The Vice-Chancellor correctly puts it thus: "It is settled that if husband and wife, each of them having interests, no matter how much, or of what degree, or of what quality, come to an agreement which is afterwards embodied in a settlement, that is a bargain between husband and wife which is not a transaction without valuable consideration." If the testator's declaration of wish is put out of the question, it is quite clear then that there is in the present case abundant valuable consideration for the settlement. On looking at the will I cannot but feel great doubt as to whether that declaration had any effect at all, having regard to the circumstance that the lady was absolute tenant in fee simple, with a full power of selling, mortgaging, giving away, or doing whatever she liked with the property up to the time of her marriage. The declaration of wish is, "That in case my said daughter shall marry she shall before marrying settle the same estate for her own separate use for life independent of her husband, and to such uses as she shall by her will and notwithstanding her coverture appoint." The testator says, "I wish you to do that before you marry;" but, in my judgment, she was not bound to do it, and might have made a bargain with her husband before marriage, as part of the price of the marriage, that she would not execute a settlement, but would allow him to have his marital right. But it is urged that, nothing having been done before the marriage, either in the way of making a settlement or bargaining

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Judgment, James, L.J.

that no settlement should be made, equitable interests have upon the marriage arisen in accordance with the limitations of the settlement which the testator wished to be made. But supposing this contention to be well-founded, if the wife had come to the Court the day after the marriage, and had said, "I forgot to make a settlement; be good enough to make one according to my rights under the will," what is the settlement which in that case would have been made? Beyond all question the settlement that would have been made by the Court would have been a settlement giving her a life estate for her separate use without power of anticipation, and a power of appointment by will which she could not release or destroy, so as to entitle her to dispose of the estate afterwards, for the restraint upon anticipation would have been framed so as to prevent her dealing with the inheritance by acts *inter vivos*. That being so, if that is the nature of the equitable interests which arose on the marriage, it is quite clear that the wife had no power of joining in the mortgage which was made to the Plaintiff, and that the Plaintiff's bill ought to be dismissed, as it was dismissed by the Vice-Chancellor, with costs as against the trustees, but, of course, without prejudice to the Plaintiff's claim against any interest which the husband himself takes under this settlement. The appeal will be dismissed with costs.

MELLISH, L.J., and BAGGALLAY, J.A., concurred.

Solicitors: *Johnston & Harrison; J. L. Morris.*

VALE *v.* OPPERT.

C. A.
1877
May 16.

[1873 . V. 2.]

Practice—Appeal—Dismissal for want of Prosecution—Failure to give Security for Costs—Rules of Court, 1875, *Order* LVIII., *r.* 15.

Where an Appellant has been ordered to give security for costs and fails to do so, the Respondent is entitled to have the appeal dismissed for want of prosecution after a reasonable time has elapsed, although no time was fixed by the order for completing the security for costs.

Statement.

THIS was an original motion by the Plaintiff before the Court of Appeal to dismiss the Defendants' appeal for want of prosecution.

On the 31st of July, 1876, a decree was made against the Defendants, *E. H. Hartmont* and *W. Lonsdale*, declaring them jointly and severally liable for the payment of £10,000. The Defendants appealed from this decree, and on the 11th of January, 1877, the Court of Appeal ordered them to give security for costs, and the appeal was stayed in the meantime, but no time was limited within which the security was to be perfected.

On this day, four months having elapsed, and the Defendants not having given the required security,

Argument.

Locock Webb, Q.C., for the Plaintiff, moved that the appeal might be dismissed for want of prosecution.

Terrell, for the Defendants, submitted that, no time having been fixed for completing the security for costs, the Court ought not to dismiss the appeal without fixing a peremptory day.

Judgment.

THE COURT (*Coleridge*, C.J., *James*, L.J., and *Baggallay*, J.A.) were of opinion that, a reasonable time having elapsed, the Plaintiff was entitled to the order asked for. The appeal was therefore dismissed with costs.

Solicitors: *Lawrance, Plews, & Baker; Elmslie, Forsyth, & Sedgwick.*

(1) Law Rep. (1875) 6 Ch. D. 363.

C. A.
1876
V.-C. H.
Nov. 4, 29.
C. A.
1877
Feb. 28.

ADAMS *v.* ANGELL.

[1871 A. 3.]

Mortgage—Equity of Redemption, Purchase of, by First Mortgagee—Effect on Rights of Second Mortgagee—Intention—Evidence.

After a decree in a foreclosure suit to which both the mortgagor and the first and second mortgagees were parties, the Plaintiff, the first mortgagee, purchased the equity of redemption from the trustee in bankruptcy of the mortgagor, and by the deed of assignment, in consideration of £1380 (the sum due on the first mortgage), retained by the first mortgagee "in full satisfaction of" his debt, and of £20 paid to the trustee (making the purchase-money of £1400), the trustee assigned the mortgaged property to the first mortgagee, "subject to the aforesaid claim" of the second mortgagee. The value of the mortgaged property did not exceed £1380. The second mortgagee contended that the effect of this purchase was to extinguish the first mortgage debt, and to let in his own charge as a first incumbrance. A correspondence took place between the solicitors of the first mortgagee and the trustee at the time of the purchase:—

Held, by the Court of Appeal (affirming the decision of *Hall*, V.C.), that looking at the surrounding circumstances the conveyance sufficiently expressed an intention to keep the first mortgage alive; and that *Toulmin* v. *Steere* (1) did not apply.

Held, also, by the Vice-Chancellor, that, the question being one of intention, a correspondence between the solicitors of the first mortgagee and the trustee in bankruptcy at the time of the purchase, was admissible in evidence, on the question whether it was intended to keep the first mortgage alive.

The rule in *Toulmin* v. *Steere* is not to be extended; and whether that decision is binding on the Court of Appeal, *quære*.

Statement.

BY indenture dated the 18th of May, 1863, the Defendant *Angell* mortgaged to the Plaintiff *Adams* certain leasehold hereditaments in the parish of *Paddington*, to secure £900 and interest.

Subsequently *Angell* mortgaged the same hereditaments, together with other property, to *Newsom*.

Default was made by *Angell* in payment of the principal and interest secured by the first mortgage, and the Plaintiff entered into possession of the mortgaged property; and on the 12th of January, 1871, filed his bill against *Angell* for foreclosure.

From *Angell's* answer it appeared that *Newsom* claimed to have a charge upon the property. The Plaintiff, on the 27th of Febru-

(1) 3 Mer. 210.

ary, 1873, amended his bill by making *Newsom* a Defendant; and *Newsom*, by his answer, claimed upwards of £1900, and an arrear of interest as due upon his mortgage.

On the 21st of November, 1874, the decree usual in a suit by first mortgagee in possession against mortgagor and second mortgagee was made, directing accounts and successive foreclosures against *Newsom* and *Angell*.

On the 15th of February, 1875, the Plaintiff carried in his account as mortgagee.

On the 4th of June, 1875, *Angell* was adjudicated a bankrupt; and on the 9th of July, 1875, *Francis Cooper* was appointed trustee in the bankruptcy.

No further proceedings were taken in the suit until the 7th of February, 1876, when the Plaintiff obtained an order of revivor against *Cooper*; and about the same time entered into an arrangement for the purchase from *Cooper* of the equity of redemption, which was carried into effect by the following deed:—

By an indenture dated the 17th of March, 1876, and made between *Cooper* of the one part, and the Plaintiff of the other part, after reciting the two leases of the mortgaged property, the mortgage to the Plaintiff, the default in payment, the entry of the Plaintiff, the filing of the bill and its amendment by adding as a Defendant thereto *Newsom* ("who had, or claimed to have, some mortgage or incumbrance affecting the said premises, and who had refused either to disclaim or redeem"), and the decree made in the suit, that £1380 was due to the Plaintiff, the bankruptcy of *Angell* and the appointment of *Cooper* as trustee in the bankruptcy; and after reciting that *Cooper*, as such trustee, had contracted with the Plaintiff *Adams* "for the absolute sale to him, subject to the said claim of the said *J. E. Newsom*," of the premises comprised in and demised by the leases for all the respective residues of the terms thereby granted, and also the fixtures and fittings, at the price of £1400; and that "it had been agreed that the said sum of £1380 so due upon the security of the said mortgage as aforesaid should be retained by the said *F. S. Adams* out of the purchase-money," it was witnessed that in pursuance of the said agreement, and "in consideration of the sum of £1380 retained by him the said *F. S. Adams*, in full satisfaction of the

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said sum of £1380 so as aforesaid remaining due and owing to him upon the said mortgage security (and which last-mentioned sum the said *F. S. Adams* doth hereby declare to be fully satisfied accordingly, and from the same doth hereby release the said *F. Cooper* and *T. G. Angell*, their respective heirs, executors, and administrators); and also, in consideration of £20" to the said *F. Cooper* paid by the said *T. G. Angell*, "the receipt whereof making, with the said sum of £1380 retained as aforesaid, the said purchase-money of £1400, and that the same is in full for the absolute purchase of the said hereditaments and premises, the said *F. Cooper* doth hereby acknowledge," *Cooper* did thereby assign to the Plaintiff, his executors, administrators, and assigns, all the premises comprised in the leases for the respective residues of the term of years granted by the said leases respectively, subject to the payment of the rents and to the performance of the covenants, "and subject to the aforesaid claim of the said *J. E. Newsom*."

This deed was executed by *Cooper*, but not by the Plaintiff.

Two summonses were then taken out by the Plaintiff's solicitors, one to proceed under the decree and order of revivor, and the other that, with the consent of *Cooper*, all further proceedings in the suit against *Cooper* and *Angell* should be stayed.

On the 10th of April, 1876, an order was made on the latter summons founded on an affidavit proving the execution of the assignment, and notwithstanding the objection of *Newsom*, who had been served with the summons. The former summons was adjourned from time to time, as it appeared, in order to enable *Newsom* to effect a compromise, and this not having been done, *Newsom* raised the contention that the effect of this purchase by the Plaintiff of the equity of redemption had been to extinguish his mortgage debt, and that such debt being satisfied, he *Newsom* had become first incumbrancer, and accordingly that the certificate should find that nothing was owing to the Plaintiff, and that there was owing to *Newsom*, as first incumbrancer, what upon taking the account of the amount owing to him should appear to be due; and upon this question the summons was adjourned into Court. A correspondence took place between Messrs. *Sheffield & Sons*, the solicitors of the Plaintiff, and the Defendant *Cooper*, about the time of the purchase of the equity of redemption, and there was

also a subsequent correspondence between Messrs. *Sheffield & Sons* and the solicitors of *Newsom*, in the course of which Messrs. *Sheffield*, whilst writing to *Newsom's* solicitors on the 28th of June, 1876, for particulars of his charges on the property, stated that their client waived as against *Newsom* any release or assignment of the equity of redemption, and was willing to be redeemed in the pending suit. The general effect of this correspondence is stated in the judgment of the Vice-Chancellor. It appeared that *Newsom's* mortgage comprised other property as well as that comprised in the Plaintiff's mortgage; that the property comprised in the Plaintiff's mortgage had been put up for sale by him in November, 1870, at a reserve price of £1200, and had not been sold, and that it was not actually worth more than the amount of the first mortgage.

Statement.

The cause was heard before Vice-Chancellor *Hall* on the 4th of November, 1876.

Hastings, Q.C., and *Whitehorne*, for the Plaintiff:—

Argument.

The contention of the Defendant *Newsom* is founded upon a passage in the judgment of Sir *William Grant*, M.R., in *Toulmin* v. *Steere* (1), to the following effect: "The cases of *Greswold* v. *Marsham* (2) and *Mocatta* v. *Murgatroyd* (3) are express authorities to shew that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor, consequently, a mortgage which he has got in, against subsequent incumbrances of which he had notice." Now, first, this is an *obiter dictum;* secondly, the cases cited are not authorities for the broad proposition in support of which Sir *William Grant* cited them; and, thirdly, the doctrine thus laid down in *Toulmin* v. *Steere* has been received with doubt and hesitation by almost every subsequent Judge who has observed upon it. As to the second point: In *Greswold* v. *Marsham*, *Marsham*, the mortgagee, having notice of the claims of two subsequent judgment creditors who desired to pay him off, bought the equity of redemption cheaper by the exact amount of the judgments of which he had notice, and the case was clear for

(1) 3 Mer. 210, 224.
(2) Hil. T. 1 Jac. 2, Reg. Lib. A. 1685, fo. 399; 2 Ch. Cas. 170.
(3) 1 P. Wms. 393.

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relief in favour of the judgment creditors against him, not *quâ* mortgagee, but *quâ* purchaser of the equity of redemption; and though in that case the purchase was after a decree in a foreclosure suit, it was a suit to which the judgment creditors were not parties: *Dart's* Vendors and Purchasers (1). *Mocatta* v. *Murgatroyd* (2) is still less an authority. There the carelessness and long acquiescence of the mortgagee of a ship was held to amount to an implied consent to subsequent mortgages on the ship so as to give a preference to them, and it was held that, though the first mortgagee took a release of the equity of redemption, this did not oblige him to pay off the intermediate mortgages if he would waive the release. Then, upon the third point, the decision in *Toulmin* v. *Steere* (3) is questioned in *Parry* v. *Wright* (4), *Watts* v. *Symes* (5), *Hayden* v. *Kirkpatrick* (6), *Anderson* v. *Pignet* (7), and *Stevens* v. *Mid-Hants Railway Company* (8). *Squire* v. *Ford* (9) is in fact the solitary case in which *Toulmin* v. *Steere* is mentioned with anything like approval, and there the remark of Vice-Chancellor *Turner* upon it was an *obiter dictum*, for he expressly said (10) that it did not apply to the case then before him. Moreover, in *Toulmin* v. *Steere* the mortgage debt had been in effect paid off.

Then, upon principle, after a decree in a foreclosure suit, whereby the rights of three persons have been ascertained, and their priorities settled, a dealing between two of them behind the back of the third, as it cannot prejudice the rights of the third person, so it cannot entitle him to take any benefit under it. The question is in fact one of intention. The mere fact of the first mortgagee buying the equity of redemption is not enough. The first mortgage was not paid off, and to attribute to the first mortgagee the intention to postpone his debt to that of the second mortgage, and so to pay £20 in order to have the privilege of losing £1380, would be absurd. Upon this point the correspondence which took place between the solicitors of the Plaintiff and *Cooper* at the time of the purchase is admissible in evidence

(1) 5th Ed. p. 917. 4th Ed. 889.
(2) 1 P. Wms. 393.
(3) 3 Mer. 210.
(4) 5 Russ. 142; see p. 148.
(5) 1 D. M. & G. 240; see p. 244.
(6) 34 Beav. 645; see p. 648.
(7) Law Rep. 8 Ch. 180; see p. 187.
(8) Ibid. 1064.
(9) 9 Hare, 47.
(10) Ibid. 60.

(6)Sc 11 Jur NS. 636

to shew the Plaintiff's intention to keep alive his mortgage debt as between himself and *Newsom*.

[They also referred to *Fisher* on Mortgages (1).]

Dickinson, Q.C., *W. Pearson*, Q.C., and *Maidlow*, for the Defendant *Newsom*:—

It is possible that *Toulmin* v. *Steere* (2) may have to be reconsidered, but meanwhile it is the law of the land, and when a doctrine has been established by so eminent a Judge, and recognised for such a length of time, it will not be disturbed except by a Court of Appeal. The question is not one of priority between two existing debts, but whether one of two formerly existing debts has not been satisfied or extinguished; and if the intention of the parties is to be regarded, it must be the intention which they have expressed by their solemn deed; for the correspondence between the Plaintiff's solicitors and *Cooper* is not as against *Newsom* admissible as evidence of the intention of the parties to the deed. Now the deed in this case appears expressly framed with the view of shewing that the first mortgage debt was to be treated as satisfied, and that the doctrine of *Toulmin* v. *Steere* was to apply. Had it been the intention of the parties to keep alive the first mortgage, they might have adopted that ordinary conveyancing expedient of assigning the debt to a trustee for the purchaser; but instead of this, they expressly declare that the first mortgage is to be treated as satisfied; and the property is assigned subject only to *Newsom's* claim. This is a stronger case than *Toulmin* v. *Steere*, and though it may have been thought that the doctrine laid down in that case ought not to be extended, no case has, since 1817 (the date of the decision), been decided in opposition to it. It was approved, amongst other instances, by Lord Justice *Turner* in *Squire* v. *Ford* (3), cited without objection in *Sugden's* Vendors and Purchasers (4), and the same principles were acted upon in *Parry* v. *Wright* (5), *Smith* v. *Phillips* (6), and *Tyler* v. *Lake* (7); and in it, as in this case, the

(1) 1st Ed. p. 446.
(2) 3 Mer. 210.
(3) 9 Hare, 47.
(4) Last Ed. p. 615.
(5) 1 S. & S. 369; affirmed, 5 Russ. 142.
(6) 1 Keen, 694.
(7) 4 Sim. 351.

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purchaser paid less than he otherwise would for the equity of redemption (here only £20), because he retained out of the purchase-money the amount of his own mortgage debt. The case is, however, more like *Greswold* v. *Marsham* (1), as explained in *Dart's* Vendors and Purchasers (2), which was, in fact, a suit in equity by judgment creditors against a prior mortgagee who had foreclosed and then bought the equity of redemption, and the question could not have been whether the Plaintiffs had or had not a charge, for their title to a charge could not have been disputed, but it must have been one of priority, and upon that question notice is of great importance. So here, the Plaintiff, having notice of *Newsom's* claim before he made his purchase, must pay that claim out of the estate, and cannot set up his own satisfied debt against it; and neither of the cases cited on the other side have any direct bearing as authorities against our contention.

Hastings, in reply.

Judgment, V.-C. H.

Nov. 29. HALL, V.C., after stating the facts of the case, continued:—

It is clear, from several of the letters between Messrs. *Sheffield & Sons* and *Cooper*, that Messrs. *Sheffield & Sons* negotiated with *Cooper* to buy up his interest, not because it was worth anything, but because they considered that by so doing they would prosecute the foreclosure suit with greater facility, and that Messrs. *Sheffield & Sons*, in negotiating with *Newsom*, did so being willing to pay him his costs to get rid of his interest and of the necessity of foreclosing him. I should have mentioned that *Newsom's* security included other property besides that mortgaged to the Plaintiff. The value of the other property does not appear, but after having read the affidavit of *Newsom* and his solicitors, filed since the hearing before me, it is, I think, clear that *Newsom* would have accepted some small sum in addition to his costs for his interest; and I think that there can be no doubt that the value of the

(1) Hil. T. 1 Jac. 2, Reg. Lib. A. 1685, fo. 399; Ch. Cas. 170.
(2) 5th Ed. p. 917.

mortgaged property was not more than the amount owing on the first mortgage.

Now, it has been contended before me on behalf of *Newsom* that the deed of assignment operated as a satisfaction of the first mortgage, not only as between the Plaintiff and *Cooper*, but also for the benefit of *Newsom*. The argument is founded on the case of *Toulmin* v. *Steere* (1), and the cases of *Greswold* v. *Marsham* (2) and *Mocatta* v. *Murgatroyd* (3), referred to by Sir *William Grant* in his judgment in that case, and on *Parry* v. *Wright* (4). The Plaintiffs' counsel, on the other hand, urged that these cases have been questioned or disapproved, and are not to be followed, and further, that they are inapplicable to a case like the present.

Doubtless those cases have been questioned. In *Gregg* v. *Arrott* (5) Sir *E. Sugden* said that he and Sir *Samuel Romilly* thought "at the time" it was wrong, and in *Watts* v. *Symes* (6) Lord Justice *Knight Bruce* expressed doubts as to the decision. In the recent case of *Stevens* v. *Mid-Hants Railway Company* (7) Lord Justice *James* said as to *Mocatta* v. *Murgatroyd*, *Toulmin* v. *Steere*, and *Parry* v. *Wright*, "Those cases perhaps some day will have to be reconsidered, but it is quite clear that their principle is not to be extended. Probably they are rendered innocuous by this, that conveyancers exclude their application by putting in three or four lines, saying that the original debt is to be considered as subsisting for the benefit of the person who has paid it off." But the decision in *Toulmin* v. *Steere* was recognised by Sir *George Turner* in *Squire* v. *Ford* (8), by Sir *J. Leach* and Lord *Lyndhurst* in *Parry* v. *Wright*, in effect by Lord *St. Leonards* in *Armstrong* v. *Garnett* (9), and by Lord *Cranworth* in *Otter* v. *Lord Vaux* (10). In *Anderson* v. *Pignet* (11) it was referred to by Lord *Selborne* as having been questioned by some persons, but his Lordship did not say that he disapproved or approved of it. It is said in some of the cases that the priority may be preserved. It appears to me that the question, after all,

(1) 3 Mer. 210.
(2) 2 Ch. Cas. 170.
(3) 1 P. Wms. 393.
(4) 1 S. & S. 369; affirmed, 5 Russ. 142.
(5) Ll. & Goo. 251.
(6) 1 D. M. & G. 244.
(7) Law Rep. 8 Ch. 1069.
(8) 4 D. & War. 198.
(9) 9 Hare, 60.
(10) 6 D. M. & G. 643.
(11) Law Rep. 8 Ch. 187.

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is one of intention. A mortgagee who purchases an equity of redemption from a vendor liable to pay the mortgage debt, ought, it would seem, in the absence of contract to the contrary, ordinarily to be considered as giving up his claim as creditor against the estate, and not merely his personal remedy against the mortgagor. The parties can well arrange to the contrary, but not doing so, it seems reasonable that the debt satisfied for one purpose should be deemed satisfied for all purposes. That this involves a second mortgagee being placed in a better position than he previously was, does not seem to me to affect the question. Indeed the improved position of the second mortgagee would seem, after all, to be only consistent with his contract, if such contract be considered (as it reasonably may be) to have been a contract that he should have a security on the property, but subject to a prior charge so long as the creditor having that charge remained unpaid. However, in reference to these observations, I desire to say that if *Toulmin* v. *Steere* (1), and other cases not in principle distinguishable from it, are to be reconsidered, I do not think it is for me to do so. I hold myself bound by them. I now proceed to consider whether those cases are applicable to the present case.

I have stated the effect of the correspondence between the several parties subsequent to the bankruptcy of *Angell*. This correspondence shews that for the Plaintiff to have purchased the equity of redemption on terms involving the extinguishment of his mortgage as between himself and *Newsom*, would have been for him to purchase that which was really worth nothing, paying as the price whatever sum *Newsom*, whose claim was, as above shewn, a large one, might establish as the amount of his claim, and that, although he and *Newsom* were contemporaneously negotiating for the purchase and sale of *Newsom's* interest for a trifle; and it is to be observed that if the amount which would be found due to *Newsom* was more than the property (including the other property in *Newsom's* securities) was worth (which it seems is probably the case), the Plaintiff would only be purchasing the equity of redemption in order to make a present of it and of the amount of the first mortgage (or so much thereof as the property was worth) to

(1) 3 Mer. 210.

Newsom; because, under such circumstances, he could not redeem *Newsom.* I think it a just and proper conclusion that the intention of the Plaintiff was not that he should, after having completed the purchase of the equity of redemption, be in the position above mentioned; and that his vendor did not suppose that the Plaintiff was undertaking either to pay off the second mortgagee, or to give the second mortgagee the position of first mortgagee; although no doubt the vendor had an interest in the Plaintiff's being in that position, inasmuch as thereby the right of proof of the second mortgagee against the mortgagor's estate would be got rid of or reduced.

It has been contended before me that I cannot look at this correspondence; that, the contract for purchase being completed, the purchase-deed alone can be looked at. I will first consider the case, looking at the deed alone, and so doing I think it is a just view of the case that the purchaser bought that which was a subject-matter of a litigation which was then pending, and which, as between the parties to the litigation other than the vendor, would be continued, and would as between such other parties not be affected by the transaction of the purchase of the equity of redemption. The expressions in the deed as to the debt being satisfied, I read as being a satisfaction only as between the parties to the deed, and the purchaser taking subject to *Newsom's* "claim" (and its being treated as a "claim" is not, I think, unimportant), I read as contemplating that the purchaser's position would be that of owner of the property subject to a claim not in any way improved or varied by the transaction of purchase, but left to be worked out and ascertained in the suit irrespective of the purchase.

I will now consider whether the correspondence can be looked at. I think that as between the Plaintiff and *Newsom,* the correspondence is admissible in evidence to ascertain whether as between them the Plaintiff's mortgage should be considered as subsisting. It is to be observed that there is not in the present case any difficulty by reason of the extinguishment of any legal term of years or other legal security for the Plaintiff's debt. On the whole, my decision is in favour of the Plaintiff upon the deed itself, and also separately on the deed and correspondence. Therefore the account

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must be taken as between the Plaintiff and *Newsom*, in reference to the Plaintiff's mortgage, as if the purchase had not taken place; and I think Mr. *Newsom* should not have raised his contention, and must pay the Plaintiff the costs of the hearing before me.

C. A.

The Defendant *Newsom* appealed. The appeal was heard on the 28th of February, 1877.

Argument.

Dickinson, Q.C., and *W. Pearson*, Q.C. (*Maidlow* with them), for the Appellant:—

We say that the first mortgagee has given up his security and become the owner of the estate subject to a charge: *Toulmin* v. *Steere* (1); *Waring* v. *Ward* (2); *Brown* v. *Stead* (3); *Watts* v. *Symes* (4).

[JESSEL, M.R.:—That case seems to treat the point as depending on intention.]

The bankruptcy does not affect the matter, it only transfers the right to redeem to the trustee.

[JAMES, L.J.:—Suppose he had redeemed, would that have let in your security?]

Possibly not, because it might be held that the trustee's doing anything which would have that effect would be such a palpable breach of trust that no one could take advantage of it. *Anderson* v. *Pignet* (5) was relied on by the Plaintiff, but it is irrelevant, for the extinguishment there was prevented by an outstanding term. This conveyance deprives us of the remedy to which we should otherwise be entitled under the decree, and is to our prejudice unless treated as having the effect which we contend. The law is laid down in our favour in *Sugden's* Vendors and Purchasers (6), and *Dart's* Vendors and Purchasers (7).

Hastings, Q.C., and *Whitehorne*, for the Plaintiff, were not called on.

(1) 3 Mer. 210.
(2) 7 Ves. 332.
(3) 5 Sim. 535.
(4) 1 D. M. & G. 240.
(5) Law Rep. 8 Ch. 180.
(6) 13th Ed. p. 615.
(7) 5th Ed. p. 917. 4 Ch C 839,

JESSEL, M.R. :—

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As the present case is distinguishable from *Toulmin* v. *Steere* (1) it is not necessary for us to consider whether that case is or is not binding on the Court of Appeal. The Vice-Chancellor rightly considered that it was binding upon him as a Judge of first instance, and it ought perhaps to be held that it is binding on the Court of Appeal, and that only the House of Lords has power to overrule it. On that point I will give no opinion. Assuming it, however, to be binding upon us, it amounts to no more than this, that in the case of a purchase from the owner of an equity of redemption, in which the purchase-money is partly applied in paying off incumbrances, the purchaser with notice, whether actual or constructive, of other incumbrances is not, in the absence of any contemporaneous expression of intention, entitled as against the other incumbrancers, of whose securities he has notice, to say afterwards that the incumbrances so paid off are not extinguished. It does not go beyond that, and there are several authorities which say that this doctrine is not to be carried further. Now in a Court of Equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If a charge is paid off by a tenant for life, without any expression of his intention, it is well established that he retains the benefit of it against the inheritance. Although he has not declared his intention of keeping it alive, it is presumed that his intention was to keep it alive, because it is manifestly for his benefit. On the other hand, when the owner of an estate in fee or in tail pays off a charge, the presumption is the other way, but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then, especially in the case of an owner in fee, equity will, in the absence of any declaration of his intention, destroy it; but if there is any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it. So, in the case of a purchase, there is no doubt that the purchaser who pays off a charge, though merely equitable, may have it assigned to a trustee for himself, and it will protect him against mesne incumbrances if there are any. So, also, it is

(1) 3 Mer. 210.

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admitted, that if without going through the ceremony of the assignment of an equitable charge—an assignment which really passes nothing—a declaration is inserted in the deed that the charge shall be treated as remaining on foot for the purpose of protecting the purchaser against mesne incumbrances, then the charge is treated as remaining on foot and protects him. The intention, therefore, if expressed, governs the case, but if no intention is expressed, then *Toulmin* v. *Steere* (1) says that the incumbrance which is paid off is merged, and the subsequent incumbrancers let in. Now let us see what the circumstances were in this case. The property was subject to a mortgage of between £1300 and £1400; it had been put up for sale at a reserved price of £1200, and nobody would give that price, so that the equity of redemption was worthless. Under these circumstances the mortgagee, Mr. *Adams*, instituted a suit for foreclosure. Mr. *Newsom*, the second mortgagee, was made a party by amendment, having, before he was made a party, refused either to redeem or to disclaim. The ordinary foreclosure decree was obtained, after which the mortgagor became bankrupt. Mr. *Adams* agrees with the trustee for the purchase of the equity of redemption, and then there comes a deed which I must say, with all due respect to the gentleman who drew it, might have been much better drawn, and had it been better drawn this litigation would have been avoided. It recites the institution of the suit and the order to foreclose, and recites that £1380 is now due to *Adams* upon the security of his mortgage, and that *Cooper*, as trustee in bankruptcy, had contracted with *Adams* for the absolute sale of the property to him, "subject to the said claim of the said *J. E. Newsom*," at the price of £1400. Now recollect what this claim was; it was a right to redeem the Plaintiff *Adams* on payment of principal, interest, and costs; that was *Newsom's* claim, and he could not claim anything else, for there had been a decree of foreclosure which had defined his rights. It is then recited that it had been agreed that the sum of £1380, due on the security of the mortgage, should be retained by *Adams* out of the purchase-money. Now it is gravely contended that notwithstanding these circumstances no intention is shewn to keep the charge alive against *Newsom*. It is a most

(1) 3 Mer. 210.

extraordinary hypothesis to suppose that *Adams* could have any other intention, and that he could intend to make *Newsom* the first mortgagee. We are asked, under the circumstances of this case, to read the words "subject to the aforesaid claim of the said *J. E. Newsom*" as meaning "subject to the mortgage debt due to *Newsom*, which is to be paid out of the property." It appears to me that the Vice-Chancellor was quite correct in saying that in all these cases the question is one of intention, and looking at the terms of the deed by the light of the surrounding circumstances, I am of opinion that an intention was clearly shewn not to let in *Newsom* except on the terms of his paying *Adams* his principal, interest, and costs. I am of opinion, therefore, that the decision of the Vice-Chancellor must be affirmed.

Judgment, C. A. Jessel, M.R.

JAMES, L.J.:—

James, L.J

I am of the same opinion. As I have said before, I think *Toulmin* v. *Steere* (1) ought not to be extended. The present case differs from it, there having been a foreclosure decree and the bankruptcy of the mortgagor. If the trustee in the bankruptcy had paid off the first mortgage, and taken an assignment and conveyance from the first mortgagee with constructive notice of an intermediate mortgage, it would be utterly impossible to say that by so doing he would have let in the second mortgage as the first incumbrance on the estate; and why should a person dealing with the trustee be in any worse position than the trustee? *Toulmin* v. *Steere* is totally without application in a case like this. The Plaintiff has obtained a decree declaring in fact that he is the first mortgagee, and that *Newsom* is the second mortgagee, and is only entitled to redeem him by paying principal, interest, and costs, and after that decree the Plaintiff puts in the equity of redemption. Such a transaction cannot be held to have the effect of absolutely destroying the whole benefit of the decree.

BAGGALLAY, J.A.:—

Baggallay, J.A.

I am of the same opinion. If in order to support that opinion it was necessary to dissent from *Toulmin* v. *Steere* I should have

(1) 3 Mer. 210.

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hesitated to do so without taking much more time for consideration; but I think that this case does not fall within that authority. I agree with the Vice-Chancellor "that the purchaser bought that which was a subject matter of a litigation which was then pending, and which, as between the parties to the litigation other than the vendor, would be continued, and would, as between such other parties, not be affected by the transaction of the purchase of the equity of redemption." I think that if we have regard to the circumstances of this case, it is clear from the very terms of the deed by which the property was conveyed to the first mortgagee, that the parties intended the first mortgage to be kept on foot as against the second mortgagee.

Solicitors: *Sheffield & Sons; J. M. Chamberlain.*

C. A. 1877 M. R. *Jan.* 22. C. A. *May* 17, 18; *June* 7, 8.

ROSSITER *v.* MILLER.

[1875 R. 21a.]

Statute of Frauds—"Proprietors"—Description of Vendors—Contract by Letters—Stipulation for formal Contract—Condition Precedent.

An estate was offered for sale in lots shewn upon a plan on which various conditions were printed, one of which was that each purchaser would be required to sign a contract embodying the foregoing conditions, and providing for the completion of the purchase at the expiration of a period of not more than two months from the date of the contract. *M.* made a verbal offer to *W.*, the agent of the owners, to purchase certain lots for £1000. *W.* informed him that he must purchase subject to the conditions, and promised to lay his offer before the proprietors. Shortly afterwards *W.* wrote to *M.* saying that the "proprietors" accepted *M.*'s offer to purchase the specified lots for £1000, subject to the conditions on the plan, and that he had requested the solicitors to forward to *M.* the agreement for purchase. *M.* replied by letter that his offer had better be reconsidered unless he was left at liberty to build or not as he pleased. *W.* replied by letter that the acceptance by the proprietors was not conditional, and that *M.* would be at liberty to build or not. The contract was sent to *M.*, but he refused to sign it, or to proceed with the purchase:—

Held, by the Master of the Rolls, that the word "proprietors" was sufficient to identify the vendors within the *Statute of Frauds*, and that specific performance must be decreed.

Held, by the Court of Appeal, that although the word "proprietors" was

a sufficient description, specific performance could not be decreed, for that on the true construction of the documents the signing of a formal contract was a condition precedent to the parties being bound.

Cf Hall and Jaffray, 11 L. T. Rep.

BY articles of agreement, dated the 19th of September, 1870, it was agreed among eight persons, of whom *Rossiter* and *Curtis* were two, that an estate which *Rossiter* had agreed to purchase should be conveyed to *Rossiter* and *Curtis*, who were to hold it upon trust to divide it into and let or sell it in lots, but the trust was not to appear on the face of the conveyance. The agreement provided for contributions of the purchase-money by the eight parties, and declared trusts in their favour of the moneys to arise from sales and leases. The estate was accordingly conveyed to *Rossiter* and *Curtis* in fee by a deed not declaring any trust.

About July, 1871, part of the estate was laid out in lots, and a plan prepared shewing the lots. Upon this plan were printed eight conditions, as follows:—

"(1) Price of Lots.

"The price of each lot, including the timber growing thereon, is marked on the map. The proprietors will furnish a conveyance exclusive of stamp duties, with a title commencing from the 30th of October, 1797, for the sum of £2 2*s*. for each plot. This to include the lithographed abstract, the deed of covenant embodied in the conveyance, and the contract hereinafter mentioned. Should any purchaser prefer employing his own solicitor he can do so at his own expense, paying the vendors' solicitor the sum of £2 2*s*. for the abstract of title."

"(2) Dimensions."

This was a condition as to the admeasurements and boundaries of the lots.

"(3) Building Lines."

This condition provided that the fronts of all houses must be on lines marked in the plan.

"(4) Fences."

This condition provided for fences to be erected, some by the vendors, some by the purchaser.

"(5) Buildings."

This condition contained restrictions as to what buildings might be erected by the purchasers.

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(6) Prohibition of burning bricks on the land.

"(7) Reserved Rights."

This condition reserved to the proprietors a general control over the roads and the drainage of the entire property, and some other rights.

"(8) Deed of Covenant.

"Each purchaser, on completing his purchase, to execute a deed of covenant embodying the above rules and stipulations, and providing for their due performance mutually by such purchaser and the vendors.

"Applications to purchase to be made on and after the 26th of August next to Messrs. *White & Sons*, estate agents, *Dorking*, or to Messrs. *Hart, Hart, & Marten*, solicitors, *Dorking*.

"In the event of more than one application being made during the first day's sale for any particular plot, the persons so applying to have the option of making an advance on the published price by sealed tender, to be opened by the proprietors, or a committee of them appointed for that purpose.

"Each purchaser will be required to sign a contract embodying the foregoing conditions, and providing for the payment of a deposit at the rate of £10 per cent. on the amount of the purchase-money, and for the completion of the purchase at the expiration of not exceeding two months from the date of the contract. The costs of such contract will be included in the fixed charge for the conveyance provided for by the first stipulation."

In April, 1875, the Defendant called upon the Plaintiff *White*, one of the beneficiaries, who was acting as agent about the sale, and verbally offered to purchase certain of the lots for £1000. *White* pointed out to the Defendant that he must purchase subject to the conditions printed on the plan, and promised to lay his offer before the proprietors.

On the 21st of April *White* wrote to the Defendant as follows:—

"The proprietors have this day agreed to accept your offer of Saturday last, conveyed to them through me, viz., to purchase for £1000 plots 33, 34, and 35 on the original estate plan, dated July, 1871, and Lot 1 in the sale particulars of August, 1873, subject to the conditions and stipulations printed on the plan first named.

It was taken into consideration by them in reducing the published price that you intended building at once, which of course they wish to encourage. I have requested Messrs. *Hart & Marten* to forward you the agreement for purchase. Will you please elect whether to take the title, or employ your own solicitor?"

It appeared on the evidence that the offer was accepted on the 21st, at a meeting of proprietors at which six were present.

On the 22nd of April the Defendant replied:—

"I am in receipt of yours of yesterday's date, in which you say, 'It was taken into consideration by them in reducing the published price that you intended building at once, which of course they wish to encourage.' I cannot be bound to build at any given time, or at all; therefore, as you say the reduction in price was in consequence of your understanding that I should build at once, the offer had better be reconsidered, unless you are prepared to leave me at liberty to do as I may think best."

On the same day *White* rejoined:—

"Mine to you of yesterday's date was not intended to convey a conditional acceptance of your offer therein defined. I gathered from your remarks that you intended to build shortly, but it is not the wish of the proprietors or myself to bind you in any way to do so. In developing an estate like this, every house that is built increases the value of the remaining land. This I laid before the proprietors. Your offer I take to be based simply on the stipulations of July, 1871, so that, in your own words, 'you are at liberty to do as you may think best.'"

Shortly afterwards the Defendant informed *White* that he should not employ a separate solicitor. On the 30th of April Messrs. *Hart, Hart, & Marten,* the solicitors of the owners, sent the Defendant a formal agreement with a letter asking him to return it signed with a cheque for £100 deposit. On the 3rd of May the Defendant returned the agreement unsigned, with a letter declining to do anything more as to the purchase of the land, but offering to pay any reasonable charges for the trouble incurred.

A correspondence ensued, in which the solicitors for the proprietors insisted that the Defendant was bound by the letters and

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Statement.

could not repudiate, and ultimately all the persons entitled legally or equitably to the land commenced this action for specific performance. The statement of claim, after stating the transactions of 1870, the laying out part of the estate for building, and the conditions printed on the plan, proceeded to state that in April, 1875, *Rossiter* and *Curtis* were seised in fee, and that they, together with the remaining Plaintiffs, "were the proprietors" of the property offered for sale; and that in the beginning of April, 1875, the Defendant obtained from *White*, "who was then acting as the agent of the said proprietors in relation to the aforesaid estate," a copy of the plan of July, 1871. The subsequent statements were to the effect given above. The Defendant, by his defence, did not admit that *Rossiter* and *Curtis* were seised in fee, or that they and the other Plaintiffs were the proprietors of the land, or were the persons signified by the expression "the proprietors" in the correspondence. He alleged that no contract in writing, or note, or memorandum of a contract for purchase, had been signed by him or any person authorized by him, and he claimed the benefit of the *Statute of Frauds*. He did not, however, traverse the allegations that *White* was acting as agent of the proprietors.

At the trial before the Master of the Rolls, the question whether the letters were such as to constitute a concluded contract was hardly adverted to, the question chiefly argued being whether the word "proprietors" was a sufficient description within the *Statute of Frauds*. The Master of the Rolls held that it was, and decreed specific performance. The Defendant appealed.

Argument.

Chitty, Q.C., and *Phear*, for the Appellant:—

The letters here only amount to a contract to enter into a contract, some of the terms of which were left uncertain, and therefore do not constitute an agreement of which specific performance can be enforced: *Smith* v. *Webster* (1); *Ridgway* v. *Wharton* (2); *Honeyman* v. *Marryatt* (3); *Chinnock* v. *Marchioness of Ely* (4). The parties were not to be bound till the formal contract was signed. The time of completion was left uncertain.

(1) 3 Ch. D. 49.
(2) 6 H. L. C. 238.
(3) 21 Beav. 14; 6 H. L. C. 112.
(4) 4 D. J. & S. 638.

In ascertaining whether letters make a binding contract, the Court may look at the whole correspondence and at the surrounding circumstances: *Pym* v. *Campbell* (1); *Honeyman* v. *Marryatt* (2). Here there are no conditions as to title, and if the position of the parties was reversed the proprietors would contend with reason that they ought not to be held to have bound themselves by an open contract which imposes formidable liabilities on a vendor. Then we say that "proprietors" is not a sufficient description. It is against reason that any description should be held sufficient which does not enable the other party to know who the persons are with whom he has contracted until an abstract of title has been produced to him. *Commins* v. *Scott* (3) and *Thomas* v. *Brown* (4) are distinguishable. Then it is uncertain, even now, who are meant by "proprietors." Does it mean the eight persons interested, or the two trustees? It is incumbent on the Plaintiffs to shew that they had all made themselves parties to the negotiation before it was broken off by the Defendant, and this they have not shewn. The offer was only accepted by six out of the eight proprietors, and it is not shewn that *White* had any authority to act for the others.

Davey, Q.C., and *Carson*, for the Plaintiffs:—

The letters amount to an offer and an unconditional acceptance, and the reference to a more formal contract cannot make the matter conditional: *Reuss* v. *Pecksley* (5); *Kennedy* v. *Lee* (6); *Thomas* v. *Dering* (7). The parties evidently contemplated a further contract, but there are no words to make the signing of one a condition precedent. Then it is said that it does not appear that *White* was the agent of all the persons interested; but if he was not, they could ratify what he did.

[JAMES, L.J.:—That would not do unless they ratified the contract before the other side repudiated it.]

The question is not raised on the pleadings. The statement of claim defines who the proprietors were—viz., the eight owners—

(1) 6 E. & B. 370. 2 Jur. N.S. 641.
(2) 21 Beav. 14; 6 H. L. C. 112.
(3) Law Rep. 20 Eq. 11.
(4) 1 Q. B. D. 714.
(5) Law Rep. 1 Ex. 342.
(6) 3 Mer. 441.
(7) 1 Keen, 729.

(2) C 1 Jur. N.S. 857; 4 L. J. 17

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and states that *White* acted as the agent of the proprietors. This is not traversed by the defence. The Defendant, therefore, cannot now dispute that *White* was authorized by the eight. The objection is of the most technical character, that two out of the eight are not proved to have given *White* authority. Had it been raised on the pleadings, we should probably have been able to prove that they did. Then as to the sufficiency of the word "proprietors," *Potter* v. *Duffield* (1), *Catling* v. *King* (2), are for us. The law is summed up very neatly in *Benjamin* on Sales (3). The question whether the expression here denotes the two or the eight really does not arise, for the conditions of sale to which the letters refer speak of a committee of the proprietors, which quite excludes the notion that "the proprietors" can mean the two.

[JAMES, L.J.:—Have you any case in which letters have been held to make a concluded contract, where one of the terms in them was that the purchaser would be "required" to sign a contract?]

We have not found a case containing those words; but in *Honeyman* v. *Marryat*, and the other cases in which the letters have been held not to make a contract, the words imported a condition precedent much more strongly than here.

[BAGGALLAY, L.J., referred to *Chinnock* v. *Marchioness of Ely* (4).]

Judgment, Lord Coleridge, C.J.

LORD COLERIDGE, C.J.:—

Among the points made in this case there are several upon which it is not necessary for us to give any opinion. The main question argued before the Master of the Rolls appears to have been whether the word "proprietors" in the correspondence and in the conditions there referred to is sufficient so to identify the persons filling that character, though unknown at the time to the Defendant, as to satisfy the *Statute of Frauds*. In the view we take of the case it is not necessary to decide that question, but it has been fully argued before us, and I must say that I am not prepared to dissent from the conclusion at which the Master of the Rolls arrived, that the word "proprietors" is a sufficient descrip-

(1) Law Rep. 18 Eq. 4.
(2) *Post*, p. 660.
(3) Page 171.
(4) 4 D. J. & S. 638.

tion, a conclusion which appears to be founded on common sense, and has been assented to by Vice-Chancellor *Malins* in *Beer* v. *London and Paris Hotel Company* (1).

Another question was raised, as to the extent of *White's* authority, and the persons whom we are to consider that he represented. The persons interested in the estate were eight, two of whom, under articles of agreement, were to act as trustees for themselves and the other six. The estate was vested in these trustees by a deed not disclosing any trust, and all dealings with strangers were to be entered into in the names of the trustees alone. The question, then, is raised whether the word "proprietors," assuming it to be in the abstract a sufficient description, is to be treated as referring to the eight or the two. If it were necessary to decide the point, I should think it reasonably clear that it referred to the eight. In the 6th paragraph of the statement of claim it is alleged that *White* "was then acting as the agent of the said proprietors in relation to the aforesaid estate," and that he pointed out to the Defendant that he must purchase subject to the conditions and stipulations printed on the plan of July, 1871, and promised to lay the Defendant's offer before the proprietors. *White* then, by his letter of the 21st of April, 1875, informs the Defendant that the proprietors have agreed to accept his offer to purchase, subject to the conditions and stipulations printed on the plan. If, then, we refer to those conditions, we find that they treat "the vendors" and "the proprietors" as being interchangeable terms, and provide that if more than one application is made for a particular lot, the persons so applying may make an advance on the published price by sealed tender, to be opened by the proprietors "or a committee of them." In this clause "the proprietors" must mean the eight. But the only reasonable view is, that the word was used in the same sense throughout. If so, the statement of claim contains an allegation that *White* was acting as agent for the eight, and this must be taken as meaning that he was authorized by the eight to act as their agent. The authority of *White* is disputed on highly technical grounds. The answer given by Mr. *Davey* is technical, but if, though technical, it is sufficient, that is enough; and I am of opinion that it is sufficient.

(1) Law Rep. 20 Eq. 412.

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The claim, as I have said, alleges that *White* had the authority of the eight proprietors; the statement of defence does not traverse this, so we have an admission on the pleadings that *White* acted by the authority of the eight. So far, therefore, as this point is concerned, I think that the judgment is right.

But there is a grave preliminary question, which was rather assumed than argued at the Rolls, viz., whether the letters are such as to amount to a concluded contract, and in this, speaking with the greatest respect, I cannot agree with the judgment of the Master of the Rolls. The *Statute of Frauds* requires a memorandum in writing which substantially ascertains the terms of the contract. Now, one way of trying the question whether there is a complete contract here is to reverse the position of the parties, and see whether there is an agreement which could be enforced against the vendors. The question turns on two or three letters. The Defendant sees *White*, who, I will assume, had authority to entertain the Defendant's verbal offer and submit it to the proprietors, and to write the letters which he did write—he sees *White* and makes him a verbal offer. *White* tells him that he must purchase subject to the conditions on the plan, and promises to submit his offer to the proprietors. The Defendant must, therefore, be taken to have assented to those conditions. His offer is submitted to the proprietors, who accept it, and *White* writes thus: "The proprietors have this day agreed to accept your offer of Saturday last, conveyed to them through me, viz., to purchase for £1000 plots 33, 34, and 35 on the original estate plan dated July, 1871, subject to the conditions and stipulations printed on the plan. I have requested Messrs. *Hart & Marten* to forward you the agreement for purchase, will you please elect whether to take the title or employ your own solicitor?" Now what were these conditions and stipulations? They chiefly relate to various things to be done by the proprietors and by the purchaser on the land, but the first clause is as follows:—[His Lordship read the first clause.] The contract there referred to is further mentioned at the end of the last condition. "Each purchaser will be required to sign a contract embodying the foregoing conditions, and providing for the payment of a deposit at the rate of £10 per cent. on the amount of the purchase-money,

and for the completion of the purchase at the expiration of not exceeding two months from the date of the contract." That is one of the conditions and stipulations subject to which the offer is made and accepted, and in accordance with this, *White* says he has requested the solicitors to forward to the Defendant the agreement for purchase, *i.e.*, the agreement which, by the conditions, he was to sign. The Defendant, on the 22nd, writes with reference to an expression in *White's* former letter, and says that his offer had better be reconsidered, unless the proprietors are prepared to leave him at liberty to delay building if he thinks fit; and *White*, on the same day, replies that the Defendant is left at liberty to do as he may think best about building. Shortly after this the Defendant, upon a formal contract being sent to him (we need not consider whether it was conformable to the conditions or not), writes a letter to the Plaintiffs' solicitors repudiating the contract, and desiring them to consider the matter as at an end. The solicitors write to the Defendant, saying in effect, "You cannot repudiate. What we sent you was not the contract on which we rely, but only an instrument for expressing in detail the terms of an agreement by which you are already bound." Now, looking at the case apart from the authorities, which, perhaps, is the best way of approaching a question of construction, it is to my mind very plain that neither the Plaintiffs nor the Defendant thought that by these letters they had bound themselves by something other than the agreement which it was stated would be sent to the Defendant. The proprietors in substance say, "We agree to your offer, part of which offer is to sign a contract embodying the printed conditions, we will send you one in the proper form, and when you and we have signed it we shall be bound;" and I believe that neither party thought of being bound until that contract was signed. This is the result at which I should arrive apart from authority, but it is not often that we find a case so closely bearing on another as *Chinnock* v. *Marchioness of Ely* (1) does on this. Lord *Westbury* there says: "I entirely accept the doctrine contended for by the Plaintiff's counsel, and for which they cited the cases of *Fowle* v. *Freeman* (2), *Kennedy* v. *Lee* (3), and *Thomas*

(1) 4 D. J. & S. 638, 645. (2) 9 Ves. 351.
(3) 3 Mer. 441.

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v. *Dering* (1); which establish that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the *Statute of Frauds*, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged, or his agent lawfully authorized, there exist all the materials which this Court requires to make a legally binding contract. But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation." That exactly points out the true distinction between the two classes of cases, within one of which the Plaintiffs, and within the other of which the Defendant, allege the present case to fall. If a set of terms are agreed upon in writing, they constitute a contract, although it may be the intention of the parties that they should be put into a more formal shape; but here a set of terms never was finally agreed to, and the Defendant cannot be held to be bound.

James, L.J.

JAMES, L.J. :—

I am of the same opinion. I quite agree with what has been said by the Lord Chief Justice as to our not being authorized to differ from the Master of the Rolls as to the question whether the word "proprietors" sufficiently describes the vendors so as to satisfy the *Statute of Frauds*. To hold that it does, is a sensible and convenient rule, and has been accepted by more than one Judge in the Chancery Division, and I hope that the question is now settled.

As to the main point, whether there was a contract, I am unable, on the construction of the documents, to come to the same conclusion as the Master of the Rolls. On a question of construction, different minds may differ, but, for my own part, I have often felt that in cases of this nature parties have found themselves

(1) 1 Keen, 729.

entrapped into contracts by letters which they wrote without the slightest idea that they were contracting. This especially works hardship in the case of a vendor of real estate, considering what the liabilities of a vendor under an open contract are. Suppose that in the present case the positions of the parties were reversed; that a correspondence such as that before us had taken place as to a single lot worth £100, and the Plaintiff was seeking to enforce against the owners an open contract contended to be constituted by these letters, and calling upon the vendors to produce not only their own title, but that of the lord of the manor who enfranchised the property, and to furnish at their own expense attested copies of all deeds of which the originals could not be handed over, and covenants for their production. Had the Court fixed the vendors with those liabilities, they would have thought the Court a singular Court of Justice. But if the Plaintiffs were not bound, it cannot be held that the other party was bound, and we certainly should not have been inclined to hold that the vendors had bound themselves so as to incur these liabilities. The reasonable view of the case is that the parties intended the signing the formal contract to be a condition precedent. The question is not whether there was an agreement within the *Statute of Frauds;* there never was any concluded agreement at all.

BAGGALLAY, L.J.:— Baggallay, L.J.

On the questions whether *White* acted as agent of the two or of the eight, and whether the vendors are sufficiently described by the word "proprietors," I agree with the Master of the Rolls, subject to the observation that we have not heard a reply; but as to the other point, I agree with the Lord Chief Justice and Lord Justice in dissenting from his conclusion. There is a reference in the letters to the printed conditions which provide for a formal contract being signed, and this would naturally lead any person making an offer to suppose that nothing was binding until such a contract was signed, and that the correspondence was only a negotiation as to the price. The Defendant verbally offers £1000 for certain plots. *White,* by his letter of the 21st of April, signifies the proprietors' acceptance of the offer subject to the stipulations on the plan, one of which conditions provides for the signing of a

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formal contract, and the letters of the 22nd of April left the Defendant a right to believe that the signing of a formal contract was necessary to create a binding agreement. The case comes within the principle laid down by Lord *Westbury* in *Chinnock* v. *Marchioness of Ely* (1), that if an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation. The circumstances in that case, and in *Honeyman* v. *Marryatt* (2), are substantially the same as in the present, and I agree that no concluded contract was ever entered into.

Solicitors: *Duncan, Murton, Warren, & Gardner; Prior, Bigg, Church, & Adams*, agents for *Drummond, Robinson, & Till, Croydon.*

C. A. 1877 *March* 14, 21.

CATLING *v.* KING.

[1876 C. 357.]

Vendor and Purchaser—Statute of Frauds—Description of Vendor—"Trustee selling under a Trust for Sale"—Pleading—Demurrer—Rules of Court, 1875, *Order* XIX., *rr.* 18, 23.

A contract for the sale of land in which the vendor is not named, but is stated to be "a trustee selling under a trust for sale," is sufficient within the *Statute of Frauds*.

A defence founded on the *Statute of Frauds* cannot now be raised by demurrer.

Statement.

ON the 20th of August, 1873, the Plaintiff agreed to buy lots 3 and 4 mentioned in the particulars and conditions of sale, under which certain property had been offered by auction, and signed an agreement indorsed on the particulars and conditions. Part of the 15th condition was—

"The vendor is a trustee selling under a trust for sale, and the concurrence of the persons beneficially interested shall not be required."

The agreement was as follows:—

"I, *Edward Catling*, of, &c., do hereby acknowledge that I have

(1) 4 D. J. & S. 638. (2) 6 H. L. C. 112.

this day purchased the property described in this particular as lots 3 and 4 for the sum of £1100, and having paid into the hands of Messrs. *Brown, Roberts, & Co.* the sum of £110 as a deposit, and in part payment of the purchase-money, I do hereby agree to pay the remainder thereof, and to complete the said purchase in all other respects agreeably to the conditions of sale, so far as the same are applicable to a sale by private contract. As witness my hand this 20th day of August, 1873.

Statement.

"*E. Catling.*"

At the foot of the above was a memorandum signed by the auctioneers as follows:—

"We ratify this sale, and, as auctioneers, acknowledge to have received the said deposit.

"20/8/73. *Brown, Roberts, & Co.*"

The Plaintiff having brought an action against *King* for specific performance, *King* demurred, and the demurrer was allowed by Vice-Chancellor *Hall* on the ground that the statement of claim did not shew a good contract under the *Statute of Frauds*. The Plaintiff appealed.

Argument.

W. Pearson, Q.C., and *Jason Smith*, for the Appellant:—

Here is a good description which sufficiently identifies the vendor: *Hood* v. *Lord Barrington* (1); *Sale* v. *Lambert* (2); *Potter* v. *Duffield* (3); *Thomas* v. *Brown* (4); *Rossiter* v. *Miller* (before the Master of the Rolls, Jan. 22, 1877) (5); *Beer* v. *London and Paris Hotel Company* (6); *Morris* v. *Wilson* (7). In *Skelton* v. *Cole* (8) the decision did not go on the ground that the description was insufficient. A form similar to that here used is given in *Davidson*, Conv. (9); *Hayes*, Concise Conv. (10); *Sugden's* Vendors and Purchasers (11).

[MELLISH, L.J.:—There the agent binds himself.]

(1) Law Rep. 6 Eq. 218.
(2) Ibid. 18 Eq. 1.
(3) Ibid. 18 Eq. 4.
(4) 1 Q. B. D. 714.
(5) Since heard on appeal, *ante*, p. 648.
(6) Law Rep. 20 Eq. 412.
(7) 5 Jur. (N.S.) 168.
(8) 1 De G. & J. 587.
(9) 2nd Ed. p. 554.
(10) 3rd Ed. p. 173.
(11) 11th Ed. p. 1075.

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So he does here: *Morris* v. *Wilson* (1); *Calder* v. *Dobell* (2); *Appleton* v. *Binks* (3); *Commins* v. *Scott* (4); *Newell* v. *Radford* (5).

[They stated that an abstract of title was delivered, from which it appeared that *King* was a trustee for sale of the property. It also appeared from the abstract that a mortgage to two persons by way of trust for sale was subsisting on the property.]

Hemming, Q.C., and *Russell Roberts*, for the demurrer:—

[MELLISH, L.J.:—Can this defence be raised by demurrer? It certainly could not be raised in that way at common law before the *Judicature Act*.]

It could in equity: *Wood* v. *Midgley* (6).

[THEIR LORDSHIPS intimated an opinion that, under Rules of Court, 1875, Order XIX., rule 23, the defence could not now be so raised, but at the desire of both parties proceeded to hear the case on the merits.]

There is no identification without parol evidence under such a description as this: *Potter* v. *Duffield* (7); *Thomas* v. *Brown* (8); *Boydell* v. *Drummond* (9); *Williams* v. *Lake* (10). In *Thomas* v. *Brown* the Judges were inclined to hold that the later decision at the Rolls was preferable to the earlier, and overruled it. In all the authorities the only description of the person held sufficient has been a name or a designation by way of office or otherwise equivalent to a name.

[JESSEL, M.R.:—The object of the statute was to prevent perjury. Surely that is satisfied by such a description as "owner of the property."]

The ownership might be disputed: *Champion* v. *Plummer* (11). There may be two different trustees for sale of the same property under different instruments, and a description like this would

(1) 5 Jur. (N.S.) 168.
(2) Law Rep. 6 C. P. 486.
(3) 5 East, 148.
(4) Law Rep. 20 Eq. 11, 15.
(5) Ibid. 3 C. P. 52.
(6) 5 D. M. & G. 41.
(7) Law Rep. 18 Eq. 4.
(8) 1 Q. B. D. 714.
(9) 11 East, 142.
(10) 2 E. & E. 349.
(11) 1 B. & P. (N.S.) 252.

then require to be supplemented by parol evidence. That is, in fact, the case here, for there are other trustees for sale.

[JESSEL, M.R. :—The others are not "a trustee."]

The vendor is not identified by the contract itself, nor does it refer to any document which identifies him. The connection between that document and the contract must be shewn in writing: *Warner* v. *Willington* (1); a probability of their connection is not enough: *Boydell* v. *Drummond* (2). If this decision is reversed, the law, as deduced by Mr. *Dart* from the cases, *Dart's* Vendors and Purchasers (3), will require much modification.

Argument.

JESSEL, M.R.:—

Judgment, Jessel, M.R.

The question we have to decide—though, in my opinion, it is one which cannot properly be raised by demurrer—is whether we have here a sufficient contract within the *Statute of Frauds*. The name of the vendor is not mentioned in the document, but the 15th of the conditions of sale, to which the memorandum signed by the Plaintiff refers, states that the vendor is a trustee selling under a trust for sale. The Plaintiff by this memorandum acknowledges that he has purchased lots 3 and 4 for £1100, and paid a deposit, and agrees to complete the sale according to the conditions, so far as they are applicable to a sale by private contract. The auctioneers sign the following note at the foot: "We ratify this sale, and, as auctioneers, acknowledge to have received the said deposit." The Defendant, the vendor or the alleged vendor (on the present pleadings he must be taken to be the vendor, though at the hearing he will be at liberty to shew that he gave no authority to the auctioneer), is a trustee selling under a power of sale which must be presumed to have been created by deed. Now, I take the law to be settled, as laid down by Mr. *Dart*, that the vendor must be named or sufficiently described in the contract. Is there here a sufficient description? He is described as trustee for sale of certain lands specifically mentioned. Of course, if a trustee of land, he must be trustee under some instrument, and there his name will be found. I think that there is here no

(1) 3 Drew. 523. (2) 11 East, 142.
(3) 5th Ed. pp. 217, 218.

C. A. 1877 CATLING v. KING. Judgment, Jessel, M.R.

such danger as the *Statute of Frauds* intended to guard against with regard to the identification of parties. There may, indeed, be two trustees for sale of the same land under different instruments, as there may be two persons of the name of *John Smith*, and you may require parol evidence in that case to shew which it was. But that does not at all prevent such a description as this, which is really more precise than the name of the man in many cases would be, from being a sufficient description. It certainly is one by which the person may be more easily identified than the name of "Mr. *Smith*" or Mr. *Jones*," or probably, as the Lord Justice suggests, the name of Mr. *William King*. There is no doubt that there are a great many Mr. *William Kings*. In every case it must be considered what is a sufficient description with reference to the surrounding circumstances and facts. It will be a very great surprise to me if it turns out that there are two people who can satisfy the description of "a trustee for sale" of specified freehold land. I think that this is an amply sufficient description, and that there is neither principle nor authority for holding that this was not a good contract under the statute.

James, L.J.

JAMES, L.J.:—

I am entirely of the same opinion. All that the statute requires is that the parties should be described in a way which sufficiently identifies them. A person might sell who had no name at all. There may be a seller with no name but a Christian name or no name but a nickname. All we want is something to identify the individual, and "a trustee for sale of *Blackacre*" seems to me to be as good a designation as "*John* the son of *Thomas*" or *John* the Penman," or "the owner of such and such an estate," or "the possessor of such and such a title." The only difficulty which struck me at the moment was mentioned by Mr. *Russell Roberts*, who suggested that there might be two trustees in this case of the same property under different instruments. That is an ambiguity which would have to be dealt with, but it is no more than what might occur in any case, for you could almost always shew two persons of the same name and two properties of the same name.

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MELLISH, L.J.:—

Judgment, Mellish, L.J.

I am of the same opinion. There is no authority directly in point, and we have therefore to consider what is the proper construction of the statute. The statute only requires that there should be a note or memorandum of a contract. Then the cases, no doubt, shew (what, even if not established by authority, would have been clear enough) that you must be able to discover from the written document who the vendor is. If he is left quite at large, as when he is merely described as "vendor" or as "my client," or something of that kind, that is too vague. In determining whether the description in the present case is sufficient or not, the only thing to look at is whether it is within the meaning of the statute, whether it is so vague that persons who have not contracted could by perjury be made liable on the contract. I cannot see that such a description as this exposes parties to that risk any more than if the name was mentioned and the question was raised which of the persons bearing that name was intended. It appears to me that if a man is described as a trustee for sale of certain property, he must be so by virtue of some written document, and the production of the document making him a trustee for sale of the property in question identifies him. In the absence of any authority to the contrary, I think we must hold this to be a good description.

Baggallay, J.A.

BAGGALLAY, J.A.:—

I am of the same opinion.

Solicitors: *Rooks, Kenrick, & Co.; W. R. Preston.*

C. A.
1877
V.-C. B.
Feb. 8.
C. A.
March 7.

COPE *v.* EARL DE LA WARR.

[1873 C. 136.]

Practice—Inrolment of Decree—Cons. Ord. XXIII., rr. 25, 26.

In July, 1873, a decree declaring *W.* entitled to large estates was affirmed by the Lords Justices. In February, 1877, the unsuccessful party applied for leave to inrol the decree that he might appeal to the House of Lords. In the meantime *W.*, believing himself undisputed owner of the estates, had, in October, 1876, accepted a peerage:—

Held (reversing the decision of *Bacon*, V.C.), that a party who applies within five years is entitled to inrolment as a matter of right, unless the conduct of the applicant has been such as to make it unreasonable that he should be allowed to inrol—that his merely doing nothing raised no case against him—and that his rights could not be affected by the mere fact that the opposite party had altered his position on the faith of being owner of the estate.

Statement.

THIS was an appeal from a decision of Vice-Chancellor *Bacon* refusing to direct a decree to be inrolled.

A decree was made on the 27th of June, 1873, declaring the Defendant, Mr. *West*, entitled to the lands in question in the cause, and forming the *Knowle* estate. This decree was affirmed by the Lords Justices on the 31st of July, 1873 (1). Lord *De la Warr* thereupon gave up possession of the estate to Mr. *West*. In 1876 Lord *De la Warr* and Mr. *West* severally petitioned Her Majesty as to the barony of *Buckhurst*, and the claims were referred to the Committee of Privileges of the House of Lords, who, on the 18th of July, 1876, determined that Lord *De la Warr* had not by succeeding to the earldom of *De la Warr* lost the barony of *Buckhurst*, and that Mr. *West* had not established his title to that barony: *Buckhurst Peerage* (2). On the 2nd of October, 1876, Her Majesty granted to Mr. *West* the dignity of Baron *Sackville* of *Knowle*.

Earl *De la Warr* was desirous of appealing to the House of Lords, and, being advised that inrolment of the decree was a necessary preliminary, applied to Vice-Chancellor *Bacon* on the 8th of February, 1877, for leave to inrol it.

(1) Law Rep. 8 Ch. 982. (2) 2 App. Cas. 1.

Kay, Q.C., and *E. B. Cope*, for the application.

Eddis, Q.C., and *Pemberton*, for Lord *Sackville*.

C. A.
1877
COPE
v.
EARL DE LA WARR.
Judgment, V.-C. B.

BACON, V.C.:—

As I understand the law, the time within which this application is made is not greater than that which the Court has held to be allowable. But then, exercising that discretion which is thrown upon me, I must consider the whole of the case. The whole case was before this Court, the whole case had before 1873 been before the House of Lords in *West* v. *Holmesdale* (1). I say "the whole case," because, although there was no decision as to the validity of the shifting clause in the letters patent until July, 1876, the subject was throughout before the Court, and the argument comprehended the question as to the validity or invalidity of that clause. The whole matter was ransacked, argued, fully understood by everybody, and under those circumstances the decision of the Court of Appeal was given in July, 1873. Then what has happened since? Nothing. In the House of Lords a question was mooted which was for the competency of that House alone—I mean as to the validity of the shifting clause in the letters patent, and they declared the law upon the subject. No such question as is now suggested could have been decided in that case. No such question was, nor is there any pretence for saying it was, decided; but, because Lord *De la Warr* in July, 1876, procures the judgment of the House of Lords in his favour upon the patent, he says that entitles him to open the other question, which has been so often decided, although from July, 1873, till February, 1877, no step has been taken by him to impeach it. In the meantime Mr. *West* remained, under the decree of the Court of Appeal, in possession of the estate, and in 1876 Her Majesty granted him the dignity of Baron *Sackville*, so that he has changed his position on the faith of his being owner of the estate. There is no reason for appealing now that did not exist in 1873, except that the House of Lords has decided that the dignity of *Buckhurst* has not shifted. In my opinion that is no reason for coming here to ask for an inrolment of the decree

(1) Law Rep. 4 H. L. 543.

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after the regular time, and if it were a better reason than I take it to be, I think that the time which has elapsed from July, 1876, to the present time is a reason why this application ought not to be entertained, and I am of opinion that it must be dismissed with costs.

C. A.

Earl *De la Warr* appealed. The appeal was heard on the 7th of March, 1877.

Argument.

Bristowe, Q.C., and *E. B. Cope*, for the appeal motion:—

We apply under Cons. Ord. XXIII., rule 26, because the six months allowed by rule 25 have been exceeded, but we are within the five years mentioned in rule 28. In such a case the burden of proof lies on the other side to shew why the decree should not be inrolled: *Kay* v. *Smith* (1); *Butchardt* v. *Dresser* (2). Interim dealings with the property by the Respondent are not a reason against inrolment: *Chapman* v. *Brown* (3), and still less can his taking a peerage be so.

Eddis, Q.C., and *Pemberton*, for Lord *Sackville*:—

The Court has a discretion, and ought not to facilitate an appeal after this great delay, during which Lord *Sackville*, supposing the decree to be acquiesced in, has accepted a peerage on the faith of his being owner of the estate.

Judgment, C. A. Jessel, M.R.

JESSEL, M.R.:—

This is an application for leave to inrol a decree after the expiration of six months, but before the expiration of five years from its date. As I read Order XXIII., rule 26, the applicant is entitled to have it inrolled as a matter of right unless good cause shall be shewn to the contrary. [His Lordship read rules 25, 26, and 28.] In other words, if a party applies within five years, the other side must shew cause why the decree should not be inrolled, if after the five years he must shew some reason why it should. The Vice-Chancellor seems to have overlooked this and treated the case as one where the applicant must give a special reason for inrolment.

(1) 7 D. M. & G. 383. (2) Kay, App. xxvii.

(3) 15 W. R. 474. W.N. (1867) 49.

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The reason to be shewn against inrolment must be something in the conduct of the applicant which makes it unreasonable that he should be allowed to inrol. Here it is not pretended that Earl *De la Warr* has done anything, he has merely abstained from doing anything for a period of less than five years. In the meantime Lord *Sackville* has accepted a peerage, which he probably would not have done unless he had believed himself the owner of the estate, but that does not affect Lord *De la Warr*. In *Chapman* v. *Brown* there was more to be said against inrolment than here.

Judgment, C. A. Jessel, M.R.

MELLISH, L.J.:—

Mellish, L.J.

I am of the same opinion.

BAGGALLAY, J.A.:—

Baggallay, J.A.

I agree.

Leave was given to inrol the decree, the applicant undertaking to appeal during the session of this year.

Solicitors: *Cope, Rose, & Pearson; Meynell & Pemberton.*

In re LANGHAM SKATING RINK COMPANY.

C. A.
1877
V.-C. B.
Jan. 20, 27; *Feb.* 3.
C. A.
Feb. 28; *March* 14.

Company—Winding-up—Insolvency—Meeting of Shareholders—Companies Act, 1862, *s.* 79, *sub-s.* 5; *ss.* 91, 149.

A petition for winding up a company was presented by three shareholders. It did not allege insolvency, but stated circumstances shewing that its condition was not hopeful, and that it had abandoned all but a very small part of its objects, and alleged that it was just and equitable that the company should be wound up. *Bacon*, V.C., being satisfied on the evidence that the company was substantially insolvent, ordered meetings of the shareholders to be held, that it might be ascertained whether they did not wish it wound up:—

Held, on appeal, that, as the petition did not allege any of the cases mentioned in the first four sub-sections of sect. 79 of the *Companies Act*, 1862, and did not contain allegations sufficient to make a case for interference under the 5th sub-section, a winding-up order was not authorized, and that consequently no order ought to be made except to dismiss the petition.

THIS was a petition presented on the 7th of December, 1875, by three shareholders, asking for a compulsory winding-up of the

Statement.

C. A. 1877

In re Langham Skating Rink Company.

Statement.

company. The statements of the petition were to the following effect:—

1. The company was registered on the 21st of December, 1875, as a company limited by shares.

2. The objects of the company, as stated in the memorandum of association, were:—

"(*a.*) The construction, adaptation, or occupation of any buildings or premises as a skating rink, club-house, or place of public or private entertainment.

"(*b.*) The carrying on of business as skating rink or club proprietors, and public or private entertainers.

"(*c.*) The acquisition, for the purposes of the company, of any freehold, leasehold, or copyhold land or premises in the *United Kingdom.*

"(*d.*) The hypothecation or disposition of any or all of the properties of the company by sale, mortgage, lease, exchange, or otherwise.

"(*e.*) The amalgamation of the company with any other company or companies transacting a similar business, or the purchase of the business of such other companies, or the sale of the company's business to them.

"(*f.*) The doing all such other things as were incidental or conducive to the above objects."

The capital was £75,000 in 15,000 shares of £5 each.

3–4. On the 21st of January, 1876, the company issued a prospectus stating that the object of the company was to provide a skating rink and accessories; that for this purpose properties had been purchased; and then as follows:—

"This site consists of the well-known *Portland Bazaar*, in *Regent Street*, facing the *Langham Hotel*, and of a large block of property adjoining, which will be pulled down, and on the space thus cleared will be erected a club-house and skating rink, in accordance with the accompanying design;" and at the head of the prospectus was a woodcut representing the proposed elevation.

The prospectus proceeded to state the advantages of the club, and to mention certain privileges which would be enjoyed by original subscribers for ten shares and upwards, and then continued as follows:—

"The premises purchased by the company are held under Crown leases, and form most valuable properties, independent of their utilization as a rink and club-house. The only contract entered into is dated the 18th of January, 1876, and is made between Messrs *Hall* and *Oliveira* of the one part, and the company of the other part, whereby the leases of the premises, the erection of the club-house, and the construction of the rink, under the superintendence of the company's architect, have been secured, and it is anticipated that the rink will be opened within three months from the allotment of shares."

5. By this agreement of the 18th of January, 1876, it was declared (clause 3) that the company should pay to the contractors, as and for the purchase of the premises and the construction of their buildings and works, the sum of £69,500, at the dates following, that was to say, on the 27th of January, 1876, £15,000; on the 27th of February, £10,000, on possession of the property being given; one week after commencement of the works, £10,000; on completion of the rink, £20,000; and on completion of the club, £14,500. Possession was to be given on or before the 27th of February, 1876.

7. On the 1st of February, 1876, the directors issued a circular informing the shareholders that, sufficient capital having been subscribed, the proposed rink and club-house would be forthwith begun and completed, and the committee had it in contemplation to close at an early date the issue of shares at par, and they requested shareholders to induce their friends to apply for shares.

8. On the 20th of April the first general meeting was held. The shareholders present asked for explanations why the rink had not been commenced, and were informed that the chairman had resigned and a new chairman been elected; that 6925 shares out of the 15,000 had been allotted up to that date; that the preliminary expenses amounted to £2325, exclusive of the solicitor's charges; and that the company had paid part of the purchase-money to *Hall* and *Oliveira*, who had given possession of the larger portion of the properties, not including the bazaar galleries, the occupant of which was still in possession, and might so remain for a further period, and that the remuneration of the directors had been fixed at £100 per annum.

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9. At this meeting a resolution was passed adjourning it for a fortnight that a copy of the proceedings might be sent to every shareholder. The directors sent out a report of the meeting, but did not call the adjourned meeting.

10. The company had not obtained possession of any portion of the property known as the *Portland Bazaar*, but only of the adjoining property used as stables.

11. The directors having failed to call the adjourned meeting, a large portion of the shareholders became dissatisfied, and on the 19th of May, 1876, a meeting of a large number of them took place, when a committee of inspection was appointed.

12. The directors summoned an extraordinary general meeting for the 30th of May, 1876, for the purpose of considering a resolution of confidence in the committee, and borrowed £7500 of their bankers, and thus were enabled to obtain possession of the *Portland Bazaar* on the day when the meeting was called.

13. On the 30th of May the directors laid before the meeting a balance-sheet, of which the following is a summary:—

Dr.	£	Cr.	£ s. d.
Deposit of £1 on 7886 shares	7,886	By purchase of properties, and payment under contract	33,532 12 9
Allotment call of £2 on 7764 shares	15,528	By preliminary expenses	2,368 9 5
Call of £1 on 6169 shares	6,169	By current expenses	419 2 4
Final payment of £1 on 2983 shares	2,983	By office furniture	90 17 0
	32,566	By cash at bankers	3,633 18 6
Less withdrawal and return of call	21		
	32,545		
To loans	7,500		
	£40,045		£40,045 0 0

14. At this meeting the directors informed the shareholders present that the property had been originally purchased for £15,000, for the express purpose of being sold to the company at a higher price—that such higher price was £29,500, the difference between this and the £69,500 being the price to be paid to the contractors for the buildings; that *Hall* and *Oliveira* were not contractors in the proper sense of the word, *Hall* being a clerk to the *London Syndicate, Limited*, of which *E. Clench* was the managing director,

and *Oliveira* a clerk to the *Profit Union, Limited,* of which *S. H. Emmens* was managing director and almost sole proprietor; that the company was promoted by the *London Syndicate, Limited,* and *Hall* and *Oliveira* were simply trustees for the *Profit Union;* that no arrangements had been made to build the premises, but that negotiations were pending with several of the largest building firms for the purpose, and that the lowest price mentioned for the same was £30,000; and the directors admitted that, although nothing had been done even to commence the buildings, £8000 beyond the sums stipulated by the contract to be paid had been paid to the contractors.

15. On the 22nd of August, 1876, a winding-up petition was presented by two shareholders.

16. Under the above petition *Cooper* was appointed provisional liquidator, restraining orders were served on creditors who were pressing for payment, and *Cooper* called on the shareholders for the capital unpaid on their shares, and so obtained a considerable sum of money, out of which the debts were paid, and on the 4th of November the petition, and another petition presented by a creditor, were withdrawn.

17. The company has not succeeded in allotting any material portion of the share capital beyond the 7886 shares mentioned in the balance-sheet. The money now unpaid upon its subscribed share capital is wholly insufficient to pay its debts, and is mortgaged to the company's bankers to secure the £7500 borrowed from them.

18. "Under the circumstances, the company being without funds, and the *London Syndicate, Limited,* and the *Profit Union, Limited,* being unable to carry out the objects of the company, and to erect the club-house and rink, Messrs. *Clench & Emmens* have induced the original members of the board of directors to resign their seats and to elect other persons, friends and nominees of theirs, in their place, with the object that the said contract of the 18th day of January, 1876, may be cancelled, on payment of the sum of £5000 to the *Profit Union* and *London Syndicate* companies; upon which being done, the directors intend to dispose of the leases purchased by the company, and to rent a small portion of the premises, namely, that portion lately used as a stable, and

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to erect a rink thereon, which can be done at a small cost; a proceeding totally at variance and contrary to the statements in the prospectus, and on the faith of which the majority of the shareholders subscribed for ten shares, on the understanding that a club was to be formed, and that they would thereby be eligible to become members thereof."

19. "In fact, although the company has purchased or agreed to purchase the land and premises on the site of which the intended club-house and skating rink were intended to be erected, it has been and is wholly unable from want of capital to demolish the existing erections or to build the club-house and rink, and consequently no work is in progress, or has been even commenced, on the premises."

20. "The said company is wholly unable to carry out any of the objects for which it was incorporated, except the mortgaging of its property, and it is wholly unable to commence its business; and, under the circumstances hereinbefore stated, it is just and equitable, and for the interest of the shareholders generally, that the said company should be wound up."

The petition then stated that the Petitioner *Tweed* was the holder of 100 shares, upon which he had paid £4 per share; that a call of £1 per share was due thereon, but that, owing to the unsatisfactory condition of the company, he had not paid it, but was ready to do so if the Court was of opinion that he ought; that the Petitioners *Taylor* and *Howarth* were the holders respectively of twenty shares and ten shares, on which all calls had been paid. The petition asked for a compulsory winding-up.

Shortly after the presentation of this petition, a letter, dated the 11th of December, and signed "*George Bridger*, Chairman, on behalf of the Executive Committee and Committee of Investigation," was sent to the shareholders, pointing out that it was desirable to avoid the disastrous results of winding up, and stating that the committee were on the point of concluding a satisfactory arrangement, by which, subject to the approval of the shareholders (to be obtained at a general meeting to be convened for the express purpose), the company would be provided with a substantial club-house and rink; and that a notice convening a general meeting would be issued next day.

The notice was issued accordingly, and the meeting held on the 22nd of December, *Bridger* being in the chair. Resolutions were passed to the effect that Messrs. *Turquand, Young, & Co.* be appointed to audit the accounts to be submitted to the next meeting of shareholders, in addition to the audit required by the constitution of the company; that the proposal for the sale of the company's premises in *Langham Place* and *Riding House Street* for £30,000, subject to the company taking an underlease of the *Riding House* premises for the remainder of the lease "at the rental of £2000 a year," be approved, and the executive committee be authorized to carry the same into effect; and that the petition to wind up be opposed.

At this meeting the chairman stated that part of the proposal was, out of the £30,000 to pay £5000 to the contractors for the cancellation of the contract of the 18th of January, 1876, and to lay out the remaining £25,000, or thereabouts, in building. It was pointed out, also, that against the £2000 a year rent must be set the saving of the present ground rent, which was £615 a year.

The evidence in support of the petition sought to establish that the company was insolvent.

Bridger (the chairman) and *Ravenscroft* (the deputy chairman), by a joint affidavit in opposition, said that "to the best of their belief" the debts of the company did not exceed £1200 "or thereabouts," except the debt to the bankers of £4700 or thereabouts; that in addition to the leases the assets of the company consisted of calls due from shareholders in arrear "from £1000 to £1500 or thereabouts;" that an offer had been made to purchase the company's property for £30,000, and that under these circumstances they submitted, "as regards the creditors of the company," the company was not in any way insolvent, and that there was "sufficient to pay 20*s.* in the pound to all the creditors of the company and to leave a large surplus to the shareholders, assuming that the property purchased is favourably and judiciously realized." They said they had arranged with the contractors what they deemed to be, "under the circumstances, beneficial terms for the company, under which the company have the option of cancelling the con-

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tract at any time within six months in the event of" their deeming it desirable to do so. They further said that a continual agitation had been kept up by the Petitioner with a view of damaging the company and forcing it into liquidation, with the ulterior object that the company's property should be re-purchased by the original vendor, Mr. *Browne*, and his friends, including the Petitioner *Taylor*, at a price likely to be obtained by a forced sale under a compulsory liquidation.

Statement.

Argument.

Kay, Q.C., and *Caldecott*, for the Petitioners :—

By the agreement of January, 1876, no more than £25,000 was to be paid to the contractors till after the commencement of the works. The directors, therefore, have by their own shewing overpaid the contractors to the amount of £8532 12*s.* 9*d.* The company is insolvent. They owe their bankers £4700, and other creditors about £1200. They have taken power to sell the property, they do not say to whom, for £30,000. That looks very satisfactory, but in fact there is a condition that £25,000 of the money is to be spent in building on part of the land, namely, that occupied by the stable, of which they are to take a lease at £2000 a year. It will not be worth one quarter of that rent. The remaining £5000 is to go to the promoters for cancelling the contract. So that, to meet the debts, amounting to £5900, and the liability to pay £2000 a year, they have simply no assets. They start in business with £5900 less than nothing. The desperate nature of this speculation and the conduct of the directors are sufficient to bring the case within the "just and equitable" clause, whilst the inability of the company to pay its debts is demonstrated.

We ask the Court for a winding-up order, or to direct another meeting, in order to see whether this desperate scheme is really supported by the shareholders.

Northmore Lawrence, for 144 shareholders, representing 2962 shares, supported the prayer of the petition.

Stallard, for ten shareholders, claiming to have bought their shares for cash, also supported.

Sir *H. Jackson*, Q.C., and *Oswald*, for the company and the executive committee:—

The Petitioners' advisers, finding it impossible to bring the case within any of the authorities which have construed the statute and declared the law of the Court, ask in the alternative for another meeting. To that suggestion we decline to submit.

The 5th sub-section of the 79th section of the Act is restricted to matters *ejusdem generis*: *In re Suburban Hotel Company* (1).

Is this company unable to pay its debts? Inability to pay is defined by the statute, sect. 80. Inability means reasonable certainty that the existing and probable assets will be insufficient to pay existing liabilities: *In re European Life Assurance Society* (2).

There is no averment in the petition either that the company has not commenced its business within a year, or that it is insolvent. The admission that it has power to mortgage its property shews that it is not insolvent; and the fact that a business has been carried on at a loss is not sufficient to induce the Court to make a winding-up order: *In re Suburban Hotel Company* (3).

No sufficient case for winding up has been shewn on the petition: *In re Wear Engine Works Company* (4); *In re City and County Bank* (5); *In re West Hartlepool Ironworks Company* (6); *In re London Flour Company* (7); *In re London and Mercantile Discount Company* (8).

Hemming, Q.C., and *Chester*, for forty-two shareholders, holding 1205 shares, also opposed:—

We desire that the company should be left to manage its own affairs. The petition is an attempt to substitute the discretion of the Court for that of the shareholders. The first endeavour of the company will be to get rid of or to modify the contract with *Hall* and *Oliveira*, and if that be impracticable, then to pay £5000 to get rid of it. Does any one suppose a jury would really give £5000 damages for a breach of this contract? If that be so, the

(1) Law Rep. 2 Ch. 737.
(2) Ibid. 9 Eq. 122.
(3) Ibid. 2 Ch. 737, 746.
(4) Ibid. 10 Ch. 188.
(5) Law Rep. 10 Ch. 470.
(6) Ibid. 618.
(7) 16 W. R. 552.
(8) Law Rep. 1 Eq. 277.

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company's liability is even less than £5000, and in any case it cannot be more. We wish to be allowed to make the best of our own property. We retain the larger portion of it as tenants, and we get £30,000 besides; for this we pay £2000 a year, that is to say, after deducting the ground rent, we pay about £5 per cent. per annum. Is this such a very bad bargain? From *In re Suburban Hotel Company* (1) it appears that a Petitioner must shew that the purposes, not of the prospectus, but of the company, have failed.

Cracknall, for one shareholder holding 200 shares, for which he had paid cash, and for one creditor for £890; and

Romer, for one shareholder holding 160 shares, and one creditor for £725, opposed.

B. B. Rogers, for seventeen shareholders, holding 213 shares, also opposed:—

Insolvency under the Winding-up Acts means inadequacy of all the assets when realized to meet existing (not future, or contingent) liabilities: *Ex parte Spackman* (2); *In re Suburban Hotel Company* (3); *In re Joint Stock Coal Company* (4); *In re European Life Assurance Society* (5); *In re Wear Engine Works Company* (6).

If actual insolvency is not proved, the Court will not interfere with the internal affairs of a company; no amount of mismanagement, no improvident contract, no certainty of ruin, will warrant its interference.

[He also referred to *In re Anglo-Greek Steam Company* (7).]

Then, if the Court has no jurisdiction to make a winding-up order, neither can it direct a meeting to be held. We are, in fact, outside the jurisdiction.

Kay, in reply.

(1) Law Rep. 2 Ch. 737, 745.
(2) 1 Mac. & G. 170.
(3) Law Rep. 2 Ch. 737, 742.
(4) Law Rep. 8 Eq. 146, 152.
(5) Ibid. 9 Eq. 122, 128.
(6) Ibid. 10 Ch. 188.
(7) Law Rep. 2 Eq. 1, 10. 12 Jur. N.S. 323. 35 Beav.

BACON, V.C.:—

No doubt considerable difficulties arise out of the facts of this case, and the conduct of the parties.

The petition was presented on the 7th of December; the hearing was postponed, and in the interval between the presentation of the petition and the hearing, this meeting took place, the particulars of which have been gone into so largely. The case, therefore, now to be decided is to some extent different from that which is stated on the petition.

Now, it has been argued strenuously that the Act of Parliament does not authorize this Court to interfere in any case, unless, first of all, absolute insolvency has been established; and further, that it is not the rule of the Court to interfere with the internal management of a company. To these propositions generally, I agree. Nevertheless this is a Court of Equity. The *Companies Act* does not mean to interfere with the equitable rights which partners may have, and it is the duty of the Court with respect to any partnership—and a joint-stock company is only a partnership—to prevent the management being so conducted as to produce injustice or injury to any of the members of the partnership.

Now, it is said that the company is not insolvent. The petition does not in terms allege insolvency; but it alleges this—that all the share capital upon such of the shares as have been allotted having been paid up with the exception of about £1200—the company is under a certain contract, which is a liability and can be called by no other name, which does not constitute a debt at present, but is a burden to be satisfied by the company. By this contract it is declared that the company "shall pay to the contractors as and for the purchase of the premises, and the construction of their buildings and works, £69,500." Now, what means has the company of discharging this liability? It has nothing in the world besides the property which they bought under the circumstances that have been described, and which they propose to sell for much less than half the sum I have mentioned, namely, £69,500. The dates at which the instalments of the purchase-money are to be made are stated, and then possession is to be given. These are statements in the petition which are not questioned by any of the counsel whom I have heard in opposition to

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it. The petition goes on then to state a variety of other things, which I need not stop for at present, and sets out a balance-sheet, the result of which shews that £33,500 odd was paid for the acquisition of this property, and the expenses attendant upon it, being an amount larger than the whole sum which had been paid into the hands of the directors or executive committee—one item of which was the total paid-up capital of the company, viz., £32,500. In addition to this the company borrowed a sum of £7500, and by these means they acquired the property which is the subject of the petition.

Then the petition alleges that there has been no business carried on, an expression which is extremely flexible, and may possibly be construed in various ways; but it alleges this:—[His Lordship read paragraphs 18 and 19 of the petition above stated, and continued:—] That fact is not in dispute, nor is it in dispute that the sum of £5900 is now due as a debt from the company, besides the obligation to pay £69,500, which may or may not become a debt. In this state of things it is said that the company is not insolvent. More plain and distinct insolvency, in my opinion, cannot be suggested.

But I have not to deal with that subject only; for, these and others being the allegations on which the Petitioners say that the company ought to be wound up, the hearing of the petition is intercepted by the meeting which has been talked of. If I were satisfied that at that meeting the whole of the shareholders there present had clearly stated and explained to them what was about to be done, and that the majority, unchallenged, had decided in favour of the proposal, I should think that the voice of the majority ought to prevail. If it be the will of the greater number of the shareholders that the property should be disposed of upon the terms mentioned, however ruinous or losing that scheme might be to the persons interested, I do not know that I should have any right to interfere. But what I think is this: that the Act of Parliament having, in very express terms, by the 149th section, directed that, in case the Court has any doubt upon the subject, there must be a proper meeting of shareholders held, at which, with proper information before them, they may exercise their own personal unbiassed judgment, I say it seems to me to be the express

duty of the Court to order such a meeting to be held. It is necessary that the Court should, before it refuses to exercise the power given to it by the 149th section of the Act, be satisfied that at that meeting all the shareholders knew what was intended to be done, and why it was to be done.

Now, what was the proposition at that meeting? Owing £5900, without the means of paying it, being under the obligation I have mentioned, the only means suggested whereby the company could be relieved was that a bonus of £5000 should be paid to persons who had done no work, parted with no property, given no consideration that I know of, and that an undertaking should be entered into to spend £25,000, thus making up £30,000, the price which was to be procured by the sale, leaving a debt of £5900 unpaid, and no means to pay it. That is the mode in which it is said the affairs of this company ought now to be regulated, because at the meeting of the 22nd of December that was the scheme resolved upon. I cannot think that, even if that meeting had been properly called and was properly constituted, the transaction which was then proposed was so understood by and explained to the persons there assembled, as that I ought to attend to the resolutions then come to. I have the power, and I think it is my duty, to direct that there shall be a meeting held. That I am empowered to do this under the Act of Parliament by the clause which I have referred to is clear. It is equally clear, under the 86th section, that "upon hearing the petition the Court may dismiss the same with or without costs, may adjourn the hearing conditionally or unconditionally, and may make an interim order, or any other order that it deems just." The power of the Court I cannot doubt, and if I were to adopt the wholesale argument of Mr. *Rogers*, that you must prove insolvency—that to have mismanagement and ruin is not enough—if I were to adopt even that extreme view, I say the clear insolvency of this company is proved and admitted. I further say that it is unreasonable that the proposal now made should be carried into effect, inasmuch as it contains another ingredient which diminishes its value very considerably to the disadvantage of the shareholders, namely, a stipulation that, after £25,000 has been paid in erecting this imaginary building, there shall be a rent of £2000 a year fixed upon the property.

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Under these circumstances I think I am bound to direct that there shall be another meeting held, and that at that meeting the wishes of the contributories shall be collected after a full and clear explanation of the manner in which it is proposed to conduct the affairs of this company.

The following are minutes of the order:—

Notice to be forthwith given by the secretary of an extraordinary meeting to consider resolutions for the following purposes:—

1. Whether the resolutions of the 22nd of December should be confirmed.
2. Whether a resolution should be passed that the company cannot, by reason of its liabilities, continue its business, and that it is advisable to wind up.
3. Whether a like resolution for a compulsory winding-up should be passed.
4. Whether a like resolution for winding up under supervision should be passed.
5. Whether any and what other course should be adopted.

Refer to Chambers to settle the terms of the resolutions to be proposed; to name chairman; to fix date and place of meeting; and to give any directions in detail as to the meeting which may be requisite.

Liberty to all persons appearing on the petition to attend in Chambers.

Petition to stand over till second petition-day after result of meeting ascertained.

C. A.

The company appealed. The appeal was heard on the 28th of February, 1877.

Argument.

Sir *H. Jackson*, Q.C., and *Oswald*, for the Appellants:—

The petition is demurrable: *In re Wear Engine Works Company* (1). There is no allegation in the petition that the company is insolvent, though there is in the evidence. There is jurisdiction to consult the shareholders as to how they will have the company wound up: *In re West Hartlepool Ironworks Company* (2); but there is none to order a company to hold meetings to say whether it will be wound up: *In re Joint Stock Coal Company* (3). It is established by a series of decisions that the 5th sub-section of sect. 79 of the *Companies Act*, 1862, only applies to circumstances *ejusdem generis* as those mentioned in the preceding sub-sections.

[JAMES, L.J.:—Is not a company virtually insolvent if it has not capital to carry on its business?]

(1) Law Rep. 10 Ch. 188. (2) Law Rep. 10 Ch. 618.
(3) Law Rep. 8 Eq. 146.

The allegations in this petition do not amount to that, and it would need a very strong case of that kind to induce the Court to interfere: *In re Suburban Hotel Company* (1).

Hemming, Q.C., and *Chester*, for opposing shareholders, were not heard.

Argument.

Kay, Q.C., and *Caldecott*, for the Petitioners:—

The objects of the company have totally failed, and it is "just and equitable" that the company should be wound up. The case stated on the petition is one of complete commercial insolvency; the company cannot get money even to carry out their smaller scheme, and the case is within the remarks of Lord *Cairns* in *In re Suburban Hotel Company* (2). The 91st section, by which the Court is to have regard to the wishes of shareholders, applies whenever a petition for winding up is before the Court: *In re Western of Canada Oil, Lands, and Works Company* (3). The directions as to meetings are, therefore, proper.

Judgment, C. A.
Jessel, M.R.

JESSEL, M.R.:—

It appears to me that this petition when fairly read does not state a case which could authorize the Court to made a winding-up order, and if that is so, no order at all ought to be made upon it except to dismiss the petition.

The 79th section of the *Companies Act*, 1862, states five cases, being the only cases in which the Court is empowered to make a compulsory winding-up order. The first four of them are very distinct. The first is, "whenever the company has passed a special resolution requiring the company to be wound up by the Court;" the second is, "whenever the company does not commence its business within a year from its incorporation, or suspends its business for the space of a whole year;" the third is, "whenever the members are reduced in number to less than seven;" the fourth is, "whenever the company is unable to pay its debts." No one of these four things is alleged to have happened. The ground upon which the Court is, therefore, asked to act is the fifth,

(1) Law Rep. 2 Ch. 737. (2) Law Rep. 2 Ch. 737, 745.
(3) Law Rep. 17 Eq. 1.

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namely, "whenever the Court is of opinion that it is just and equitable that the company should be wound up."

Now there is no doubt that this last clause gives the power to the Court to wind up a company in cases not coming within any of the first four heads, but, as was laid down in the case of *In re Suburban Hotel Company* (1), it is a power which must not be acted upon unless there is very strong ground for acting upon it, and for this reason, that these companies are governed by a majority of their own members, and where there is a domestic tribunal which has power to decide upon a question, it should, if possible, be left to that domestic tribunal.

Now a majority of three-fourths at one meeting, confirmed by an absolute majority at a second meeting, can wind up the company voluntarily under sect. 129, sub-sect. 2, or require the company to be wound up compulsorily under the 1st sub-section of the 79th section. Therefore the shareholders have an absolute power of saying by a majority of three-fourths whether the company shall go on or not, and a majority, without being a majority of three-fourths, can elect directors, or direct the presentation of a petition, which would, no doubt, receive every attention from the Court.

But here we have the petition of three shareholders, and it is useful to consider who they are. They do not allege that they are in a majority, or that the majority sympathises with them, or anything of the sort, but they tell us that the first shareholder, Mr. *Tweed*, is the holder of 100 shares, that he has paid £4, and that there is a call of the remaining £1, which has been made upon him, but that in consequence of the unsatisfactory condition of the affairs of the company he has not paid the same. The second Petitioner, *Charles Taylor*, holds twenty shares, upon which he has paid all the calls, and the third shareholder holds ten shares, on which he has paid all calls. Therefore we have merely 130 shares, a very small minority represented by the Petitioners.

Then what is the case they make? I am not going through it at length, but the substance of it is this, that the memorandum of association authorized the company to do a great variety of things. The prospectus, which they seek to have treated as if it could

(1) Law Rep. 2 Ch. 737.

control the memorandum of association, pointed out certain definite objects, especially the establishment of a large skating rink. They then go on to say that the number of shares applied for is not sufficient to carry out all these objects, that in consequence the company have been unable really to carry out the objects of the prospectus, and that the shareholders at a general meeting were informed thereof; that the old directors have retired and new directors have been appointed in their place, who intend to carry on, not the original rink, but a small rink, upon a portion of the premises which they have acquired, which can be done at a small cost. Then they say that the company is wholly unable to carry out any of the objects except the mortgaging of its property, and is wholly unable to commence its business. As regards that, there are two answers. First of all, if it can mortgage its property it can raise the money to carry on the rink, which, as the petition itself states, can be done at a small cost. Therefore it can carry out some of its objects. But in addition to that, we must not forget that the petition was presented before the statutory period of twelve months had expired, and it is quite possible that the directors may issue more shares. There is not a suggestion that it is impossible, and it may well be that the directors with their friends will obtain further contributions rather than lose all their money. Under these circumstances, why should the Court interfere to withdraw the decision as to the carrying on of the business from the domestic tribunal to which the Legislature has intrusted it? It appears to me, therefore, that there is no reason whatever for exercising the jurisdiction of this Court, and that the petition ought to be dismissed.

Judgment, C. A. Jessel, M.R.

JAMES, L.J.:—

James L.J.

I am entirely of the same opinion. It really is very important to these companies that the Court should not, unless a very strong case is made, take upon itself to interfere with the domestic forum which has been established for the management of the affairs of a company. *Inderwick* v. *Snell* (1) is a striking instance of the reluctance of the Court to interfere with the right of shareholders in companies to manage their own affairs. The Legislature has not

(1) 2 Mac. & G. 216.

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authorized a mere majority to say that they will capriciously discontinue the undertaking which has been begun, it was not thought right that people when advancing money in undertakings of this kind should be left at the mercy of a mere majority of their brother shareholders, and those who wish to wind up must get a majority of three-fourths. The Petitioners might have called a meeting of shareholders, who might have considered the case, and said, "It is for the interest of the shareholders generally that the company shall be forthwith wound up." That has not been done; and the substance of this petition is, that the Court is asked to say that it is for the interest of the shareholders generally that the company shall be wound up when the statutory majority of three-fourths has not been obtained. I quite agree with the judgment which has been pronounced by the Master of the Rolls.

Baggallay, J.A. BAGGALLAY, J.A.:—

I am of the same opinion; and have only one or two observations to add, and those are with reference to a point which was pressed upon us by Mr. *Caldecott*. He relied upon this allegation, which is contained in the 20th paragraph of the petition: "That the company is wholly unable to carry out any of the objects for which it was incorporated, except the mortgaging of its property, and it is wholly unable to commence its business." I do not propose to say what possible weight might be attributed to that paragraph, if it were not contradicted by other passages which are to be found in the body of the petition itself; but I think we must read that paragraph in connection with the other allegations in the petition, and it is clear that these words cannot be taken according to their simple meaning. When we look at the accounts, which are set out in one of the earlier paragraphs, there is not only shewn a balance of upwards of £3000 in the hands of the directors, but calls unpaid upon the actual shares allotted to the amount of over £7000. Now, taking that in connection with the other parts of the case, it is clear that the company was not unable to carry out any of its objects.

Solicitors: *Crook & Smith; H. W. Mackreth; Warren S. James; C. H. Edmands; C. C. Ellis & Co.; Vernon Southee; H. C. Barker.*

JOHNSON *v.* LYTTLE'S IRON AGENCY.

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M. R.
Feb. 16.
C. A.
March 28.

[1877 J. 10.]

Company—Forfeiture of Shares—Condition Precedent—Fixing Time for Payment of Call—Excessive Demand for Interest—Injunction—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *Table A., Clauses* 6, 17, 19.

The directors of a company, which was governed by the regulations of Table A. in the *Companies Act*, 1862, resolved on the 16th of September that a call of £2 per share be made, and that the shareholders be requested to pay the same as soon as possible. They afterwards, on the same day, gave verbal instructions to the secretary to make the call payable on the 16th of December, and he sent a circular notice to the shareholders accordingly. *J.*, one of the shareholders, did not pay the call, and on the 21st of December the secretary wrote to him, telling him that if he did not pay the amount of the call together with interest at 5 per cent. from the date of the call, on or before the 31st of December his shares would be liable to forfeiture. *J.* did not pay, and on the 4th of January the directors passed a resolution forfeiting his shares:—

Held, that, as the notice of the 21st of December claimed interest from the date of the call, instead of from the day fixed for its payment, as provided by clause 6 of Table A., it was a bad notice, and the forfeiture was invalid, and an injunction was granted restraining the company from proceeding further under the resolution of forfeiture.

Semble, that the time for payment of the call could not properly be fixed by a mere verbal direction to the secretary.

Decision of the Master of the Rolls reversed.

Statement.

THIS was an appeal from a decision of the Master of the Rolls.

The writ was issued on the 10th of January, 1877, and by the indorsement the Plaintiff claimed an injunction to restrain the Defendant company and the directors thereof (other than the Plaintiff) from further proceeding with a resolution of forfeiture of the Plaintiff's shares in the company; a declaration that the resolution whereby the shares were forfeited was invalid; a declaration that the Plaintiff had a right to set off moneys due from the company to him against the calls made on the shares; and payment of any balance due from the company to the Plaintiff after the set-off, and damages in respect of the resolution to forfeit.

The company was governed by the regulations contained in Table A. in the schedule to the *Companies Act*, 1862. The Plain-

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tiff was a solicitor, and had acted as the solicitor of the company from its formation in January, 1875, until June, 1875, when he was elected a director, after which he ceased to act as the company's solicitor. He was the holder of 200 shares of the nominal value of £5 each. Previously to the 16th of September, 1876, £3 per share had been called up on the shares of the company. At a meeting of the board (at which the Plaintiff was not present) on the 16th of September, 1876, it was resolved that "a call be hereby made of the whole of the unpaid capital, viz. £2 per share, and that the shareholders be requested to pay the same as soon as possible."

The secretary of the company made an affidavit in which he said: "The time of payment of the call was at the meeting of the 16th of September discussed by the directors, and I received the verbal instructions of the directors to prepare and send out the necessary notices of the call, informing the shareholders that such call should be payable on or before the 16th of December, 1876." He added that he sent notices accordingly to all the shareholders, including the Plaintiff.

The Plaintiff did not pay the call, and on the 21st of December, 1876, the secretary of the company, by the instructions of the directors, wrote to him reminding him that the call remained unpaid, and saying that "unless the amount, £400, together with interest at the rate of 5 per cent. per annum from the date of the call, is paid on or before the 31st inst. your shares will become liable to forfeiture under the provisions of the Act of Parliament governing this matter." On the 27th of December the Plaintiff's solicitors wrote to the secretary stating that the Plaintiff claimed to set off against the call the costs due to him from the company as their solicitor, and also expenses incurred by him as a director, and that an account of those costs and expenses would be furnished as soon as ready. The call not having been paid, the directors on the 4th of January, 1877, passed a resolution forfeiting the Plaintiff's shares, and notice of the forfeiture was on the 5th of January given to the Plaintiff. On the 8th of January, 1877, the company commenced an action against the Plaintiff in the Queen's Bench Division for the amount of the unpaid call and interest. On the 7th of February the Plaintiff's solicitors delivered to the com-

pany his bill of costs amounting to £575 19*s.* 4*d.*, and an account of his expenses as a director, amounting to £158 4*s.* 9*d.*, with a letter signed by the Plaintiff. On the 16th of February the Plaintiff moved before the Master of the Rolls for an injunction to restrain the Defendant company from further proceeding with the resolution of forfeiture until the hearing or until further order of the Court.

Argument.

Chitty, Q.C., and *C. H. Turner*, for the Plaintiff, in support of the motion, on the question of set-off referred to *Brown* v. *Tibbits* (1); *Harrison* v. *Turner* (2); *Rawley* v. *Rawley* (3). They further contended that the resolution was invalid.

JESSEL, M.R. (without calling on the counsel for the Defendant company), held that the Plaintiff had no right of set-off.

Cookson, Q.C., and *H. Fellows*, for the Defendant company, on the question of the validity of the resolution, referred to *Great North of England Railway Company* v. *Biddulph* (4), and *Newry and Enniskillen Railway Company* v. *Edmunds* (5).

Judgment, M.R.

JESSEL, M.R.:—

I think the only points which remain to be decided must be decided against the Plaintiff. The real question is, whether the call was properly made, and whether a day was properly appointed for payment.

As regards the fact of a call being made, there is no doubt the call was made, and the resolution was that the shareholders be requested to pay the same as soon as possible. It turned out that by the prospectus no call was to be made except at the expiration of three months, but, considering the position of the company, "as soon as possible" no doubt meant the three months. But I do not decide on that ground alone. The secretary says that at the same meeting he received verbal instructions from the directors to prepare and send out the necessary notices of the call, informing the shareholders that such call would be payable on or before the

(1) 11 C. B. (N.S.) 855.
(2) 10 Q. B. 482.
(3) 1 Q. B. D. 460.
(4) 7 M. & W. 243.
(5) 2 Ex. 118, 122.

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16th of December, 1876, and he proves that he did send out notices accordingly, and sent the letter duly posted to the Plaintiff, so that the Plaintiff had due notice of the call.

The objection is that there is no formal resolution entered in the book of the directors appointing a day for the call. Now, all that Table A says is, if any member fails to pay any call on the day appointed for payment thereof, the directors may at any time thereafter forthwith serve a notice, which they have done, to state whether a day has been appointed for the payment of the call. Now, it is quite clear that the Act of Parliament does not require the day for the call to be named in the same resolution as the one by which the call is made. You may make the call, and then you may by subsequent resolution or direction name the day for the payment. Nor does the Act of Parliament require the day to be named by any particular formal act by the directors. No doubt it requires their sanction and authority, but it does not require it to be made by a formal resolution put in that shape, or by resolution entered in the minutes. It is sufficient if they direct it. What shall be sufficient evidence of direction is another matter.

There are two authorities on the subject to which I have been referred, and they seem to go a great way in the Defendants' favour; the one was that of the *Great North of England Railway Company* v. *Biddulph* (1). There the Act of Parliament required that the call should be paid to such persons at such times and places as the notice should appoint. The resolution named the amount of the call and the time, but though formally passed by the directors it did not name either the person to whom it should be paid or the place at which it should be paid, consequently it was defective in omitting those two particulars, but the notice by the advertisement in the local papers was complete, and the question was, whether without proof of a resolution of the board directing that these notices should be served, the advertisement would do. *Parke*, B., says this (2): "As the objection that there was no distinct proof of the publication of the notice being the act of the directors, was not taken at the trial, we must assume it to have been their act." Then he says: "The question then is, whether, in addition to the specification of the place of payment

(1) 7 M. & W. 243. (2) 7 M. & W. 262.

in the notice, it is necessary that the place should be specified also in the resolution for the call." He comes to the conclusion that it is not necessary that it should be named at the time of making the call, and therefore he says, where you have no proof at all, that is, where there is an absence of proof but you find an act done which ought to be done by the authority of the directors, you must assume it to have been done by their authority: consequently the Court held the call to be good.

Then it is quite plain, though the actual resolution proved had neither of these particulars, the Court assumed that it was done by the authority of the directors. I take it as a general principle, when we find, for instance, the secretary writing letters on behalf of the company, we assume in the absence of evidence that he is authorized by the company to write them. Therefore, if there had been no evidence at all either way in this case I should be bound to assume, both on principle and authority, that this letter was written with the sanction of the directors.

Then the second case is *Newry and Enniskillen Railway Company* v. *Edmunds* (1). The point arose as to the time, and there the resolution did not specify the time. The directors were to appoint the time, and the full Court of Exchequer said this (2), *Parke*, B., giving the judgment: "It follows that the resolution to make a call need not specify either the time or place for payment; but the directors must appoint a time and place, which must be notified to the shareholder by a notice, allowing him twenty-one days for the purpose of payment." It need not be part of the resolution: "The case of the *Great North of England Railway Company* v. *Biddulph* (3) proves that the resolution need not contain the place of payment, and I think that by implication it also proves, that it need not contain the time of payment. The resolution is nothing more than a determination that thereafter 'a call' shall be made, that is that an application shall be made to each shareholder for a proportion of his share; and it is enough if the directors appoint a time or place either by public advertisement (where such a mode is allowed by the private Act) as in the case referred to, or under the general Act, by an individual notice to each shareholder: consequently that objection cannot prevail."

(1) 2 Ex. 118. (2) 2 Ex. 122. (3) 7 M. & W. 243.

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Therefore all that is required is that the directors shall authorize the secretary, the proper officer, to write the proper letter. He says he does it by authority of the directors; that is all that is wanted. No formal resolution is required, and he positively states that which the Court would presume without evidence, that it was written by the authority of the directors. It seems to me, therefore, that, all the requisites having been complied with, there is no objection to this call which can be sustained on the ground which has been taken. The motion must be refused with costs.

C. A.

From this decision the Plaintiff appealed.

The appeal was heard on the 28th of March, 1877.

Argument.

Chitty, Q.C., and *C. H. Turner*, for the Plaintiff:—

The Master of the Rolls refused the application on the ground that the right of set-off is created by statute and that it exists only in an action. But there was a right of set-off in a Court of Equity independently of the statutory right: *Clark* v. *Cort* (1); *Ex parte Stephens* (2); *Williams* v. *Davies* (3); *Freeman* v. *Lomas* (4); *Curson* v. *African Company* (5); *Peters* v. *Soame* (6); *Chapman* v. *Derby* (7).

[MELLISH, L.J.:—Will the Court relieve against a collateral remedy like forfeiture because there would be a right of set-off in an action?

JAMES, L.J., referred to *Rawson* v. *Samuel* (8) and *O'Connor* v. *Spaight* (9), and said that the principle of *Rawson* v. *Samuel* was that there was no set-off in Equity unless one of the debts is equitable.]

If the company had brought the action for the calls before forfeiting the shares the Plaintiff could have availed himself of the set-off, and then there would have been no ground for making the forfeiture.

(1) Cr. & Ph. 154.
(2) 11 Ves. 24.
(3) 2 Sim. 461.
(4) 9 Hare, 109.
(5) 1 Vern. 121.
(6) 2 Vern. 428.
(7) Ibid. 117.
(8) Cr. & Ph. 161.
(9) 1 Sch. & Lef. 305.

Moreover, the resolution making the call is invalid, because it fixes no time for payment: Table A, clause 4 (1). There ought to be a minute of the board fixing the time for payment. Verbal instructions to the secretary will not do: *D'Arcy* v. *Tamar, &c., Railway Company* (2).

Moreover, the notice of the 21st of December was bad, because it said that the shares would be forfeited if interest was not paid from the date of the call: Table A, clauses 6, 17.

[On the last point they were stopped by the Court.]

Argument.

Cookson, Q.C., and *H. Fellows*, for the company:—

This error does not make the notice bad. The notice only asks for too much interest. The Plaintiff ought to have tendered the proper sum. He is a solicitor, and must be taken to know the law. Extreme and literal accuracy is not essential in such a case. It is not a forfeiture *strictissimi juris*. In an action for the call the interest need not be specifically claimed: *Southampton Dock Company* v. *Richards* (3).

JAMES, L.J.:—

Judgment, C. A. James, L.J.

I am of opinion that the notice of the 21st of December did not comply strictly with the provisions of the contract between the company and the shareholders which is contained in the regu-

(1) Clause 4: "The directors may from time to time make such calls upon the members in respect of all moneys unpaid on their shares as they think fit, provided that twenty-one days' notice at least is given of each call, and each member shall be liable to pay the amount of calls so made to the persons and at the times and places appointed by the directors."

Clause 6: "If the call payable in respect of any share is not paid before or on the day appointed for payment thereof, the holder for the time being of such share shall be liable to pay interest for the same at the rate of five pounds per cent. per annum from the day appointed for the payment thereof to the time of the actual payment."

Clause 17: "If any member fails to pay any call on the day appointed for payment thereof, the directors may, at any time thereafter, during such time as the call remains unpaid, serve a notice on him, requiring him to pay such call, together with interest and any expenses that may have accrued by reason of such non-payment."

Clause 19: "If the requirements of any such notice as aforesaid are not complied with, any share in respect of which such notice has been given may, at any time thereafter, before payment of all calls, interest, and expenses due in respect thereof has been made, be forfeited by a resolution of the directors to that effect."

(2) Law Rep. 2 Ex. 158. 12 Jur. N.S. 548

(3) 1 Man. & G. 448.

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lations of Table A. It was the established rule of the Court of Chancery and of the Courts of Common Law that no forfeiture of property could be made unless every condition precedent had been strictly and literally complied with. A very little inaccuracy is as fatal as the greatest. Here the notice is inaccurate. It is therefore bad, and the forfeiture is invalid. I may add that, as at present advised, I think that the time for the payment of the call could not properly be fixed by a mere verbal direction to the secretary; it ought to be fixed by a formal resolution of the directors.

Judgment, C. A. James, L.J.

Mellish, L.J.

MELLISH, L.J.:—

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I am of the same opinion. I think it is clear that a forfeiture of shares is, to all intents and purposes, the same thing as any other forfeiture which deprives a man of his property. The rule at Common Law was, that before any forfeiture could take place, all the conditions precedent must have been strictly complied with. Clause 17 of Table A. says that, if the call is not paid on the appointed day, the directors may serve a notice on the shareholder requiring him to pay it, together with interest and any expenses which may have accrued; and, by clause 19, if the requisitions of the notice are not complied with, the directors may forfeit the shares. And clause 6 provides that interest is to be payable from the day appointed for payment of the call to the time of actual payment. If no notice under clause 17 had been served, it is clear that the forfeiture would be altogether bad. In this case the notice of the 21st of December was inaccurate in demanding the payment of interest from the date of the call. Was that a good notice? I think that if the notice departs in any respect from the statutory form, it is impossible for us to go into the question how much it departs. It is a bad notice, and the subsequent resolution, which is founded upon it, is invalid.

Baggallay, J.A.

BAGGALLAY, J.A.:—

I am of the same opinion. The Legislature has thought fit to impose very heavy penalties for the non-payment of calls upon shares. Not only are the shares liable to forfeiture, but the shareholder can also be sued for the unpaid calls. The Legislature has pointed out the steps which are to be taken previously to the for-

feiture, and it is essential that all those steps should be strictly followed. In the present case one of those steps has not been properly taken, and the forfeiture is therefore invalid.

The injunction asked for was granted. No costs of the motion in the Court below were given, but the Appellant was allowed his costs of the appeal.

Solicitors for Plaintiff: *Lewis & Indermaur.*
Solicitors for Company: *Stibbard & Cronshey.*

CHILD *v.* STENNING.

[1876 C. 277.]

Practice—Pleading—Joinder of Defendants—Inconsistent Alternative Relief—Counter-claim—Allegations against Third Party—Rules of Court, 1875, *Order* XVI., *r.* 3; *Order* XVII., *r.* 1; *Order* XIX., *r.* 10.

In an action for trespass by the Plaintiff, who was a lessee of *W.*, the Defendant, in his defence and counter-claim, to which he made *W.* a party, claimed a right of way by grant from *W.* prior to the Plaintiff's lease, and prayed a declaration of his rights, and an injunction, and damages against the Plaintiff; and in the alternative he prayed an indemnity and damages against *W.*

The Plaintiff amended his claim and made *W.* a Defendant, and prayed an injunction and damages against the original Defendant, and in the alternative damages against *W.*

W. demurred both to the counter-claim and the amended claim:—

Held, by *Hall*, V.C., that the counter-claim was bad in not shewing a cause of action against *W.*, and *W.*'s demurrer was allowed:

Held, also, by *Hall*, V.C., that the amended statement of claim was bad, because it prayed inconsistent alternative relief against the original Defendant and *W.*:

But, *held*, by the Court of Appeal, that *W.* was properly made a Defendant to the amended claim under Rules of Court, 1875, Order XVI., rule 3, which is not confined to cases in which the alternative relief prayed against one Defendant is consistent with that prayed against the other.

The demurrer to the amended claim was, therefore, overruled.

Honduras Inter-Oceanic Railway Company v. *Tucker* (1) followed.

Statement.

THE statement of claim in this action set forth an agreement, dated the 29th of May, 1874, made between the Rev. *A. D.*

(1) 2 Ex. D. 301.

C. A. 1877 CHILD v. STENNING. Statement.

Wagner and the Plaintiff *S. Child*, by which *Wagner* agreed to demise to *Child*, for the term of ninety-nine years from the 25th of December, 1873, with the option of purchase, a piece of land at *Brighton*, with the right of way through another piece of land belonging to *Wagner* into the *Caledonian Road*. The Plaintiff erected a skating rink and stable on the land, and on the 24th of June, 1876, an indenture of lease to the Plaintiff was executed as agreed. This indenture contained the usual covenant for quiet enjoyment. The Plaintiff complained that the Defendants *J.* and *A. Stenning*, who were builders at *Brighton* occupying premises adjoining the demised land, carried timber and other things from their workshop over part of the demised land into the *Caledonian Road*, and deposited timber and other materials on it.

The Plaintiff claimed damages, an injunction, and costs.

The Defendants, the *Stennings*, put in a defence and counterclaim, which was afterwards amended, to which they made *Wagner* a co-Defendant with *Child*, stating that on the 26th of December, 1865, before the agreement with the Plaintiff, *Wagner* had agreed to grant a lease for ninety-nine years, with the option of purchase, of the land then occupied by the *Stennings*, to Messrs. *Dean & Dickerson*, and had on the 4th of August, 1876, conveyed to them the same premises in fee; and that *Dean & Dickerson* had let them to the Defendants, the *Stennings*, as tenants from year to year. And they claimed, by virtue of the conveyance from *Wagner*, a right of way over part of the land comprised in the Plaintiff's demise to and from the *Caledonian Road*. They prayed for a declaration of their right of way, that they might be quieted in possession of such right, and might be indemnified by *Wagner* against all damages and costs, and an injunction and damages against the Plaintiff for disputing their right of way; or in case the Court should be of opinion that the Plaintiff was entitled to an injunction, then for damages against *Wagner*.

The Plaintiff put in an amended statement of claim, in which he set forth the claim made by the Defendants *Stenning*, and repeated his claim for an injunction and damages against the Defendants, the *Stennings*, and prayed that if the Court should be of opinion that the *Stennings* were entitled to a right of way as against *Wagner*, and persons claiming under him, over the land

described, then *Wagner* might be ordered to pay to the Plaintiff damages for the injury occasioned by the exercise of such right, in breach of the covenant for quiet enjoyment in the indenture of lease of the 24th of June, 1876.

On the 5th of February, 1877, *Wagner* put in a demurrer to the Plaintiff's amended statement of claim, on the ground that the same had not shewn any present cause of action against him; and that it sought alternative inconsistent relief against the Defendants thereto. On the 10th of February he also filed a demurrer to the amended counter-claim of the Defendants, the *Stennings*, on the ground that it alleged no facts shewing a cause of action or right to a counter-claim against him: and that it sought alternative inconsistent relief against the Defendants thereto.

Statement.

The demurrers came on to be heard before Vice-Chancellor *Hall* on the 6th of March, 1877. The demurrer to the counter-claim was argued first.

Robinson, Q.C., and *Fellows*, for *Wagner*:—

Argument.

The facts shew that the *Stennings* claim under a conveyance in fee a right of way, but their right depends upon the construction of the deed. On the other hand, the Plaintiff claims under a demise which not only does not disclose any such right of way, but is inconsistent with it. Our case is that there is nothing in the conveyance to the *Stennings* which can pass such a right of way: *Langley* v. *Hammond* (1). Until this question is decided between the Plaintiff and the *Stennings*, *Wagner* ought not to be made a party: *Thompson* v. *Waterlow* (2). There is not a single allegation against *Wagner* in the statement of claim, and where a Defendant brings a co-Defendant before the Court he must distinctly state the paragraphs in the claim on which he intends to rely: Rules of Court, 1875, Order XIX., rule 10. In the counter-claim there is no distinct charge against *Wagner*, and it is impossible for him to know how to meet the counter-claim: *Hillman* v. *Mayhew* (3). The relief which the *Stennings* seek against the Plaintiff and *Wagner* is inconsistent; and inconsistent relief against two persons

(1) Law Rep. 3 Ex. 161. (2) Law Rep. 6 Eq. 36.
(3) 24 W. R. 485.

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cannot be asked in the same counter-claim: *Evans* v. *Buck* (1); *Clark* v. *Lord Rivers* (2).

Argument.

Dickinson, Q.C., and *J. T. Humphry*, for the Defendants, the *Stennings*:—

All the statements in the counter-claim are substantially against *Wagner*. They point to the conveyance, deny the Plaintiff's right, and state the claim of the *Stennings*. It is in the nature of a cross bill against *Child* and *Wagner* to have the right of way settled in the presence of both of them. It is not a case of alternative inconsistent relief, as in *Evans* v. *Buck*, but a claim by a tenant to obtain a decision against a landlord who has granted an easement; for this there is sufficient authority: *Poore* v. *Clark* (3); *Pawlet* v. *Bishop of Lincoln* (4); *Daniell's* Chancery Practice (5). Therefore, wholly irrespective of the claim for damages, the Defendants are entitled to proceed in the counter-claim as if it had been a cross bill to establish a right of way in fee; in such case they could not have filed the bill against the tenant without making the landlord a party, for the purpose of having the whole question determined. That being so, the demurrer must fail, because it asserts that the *Stennings* are not entitled to any relief at all.

Robinson, in reply.

Judgment, V.-C. H.

HALL, V.C.:—

I am now dealing solely with the demurrer of *Wagner* to the amended defence and counter-claim to which he was made a co-Defendant. It is contended on his behalf that he was improperly made a party to these pleadings by this counter-claim, and it appears to me that the contention that he has nothing to do with the new matter which has been brought in by way of counter-claim is right. It is not shewn in any way that he has done any act, or that he contemplates doing any act whatever as to which the *Stennings* could have any relief in this action. No case, as it appears to me, has been made against *Wagner* in respect of

(1) 4 Ch. D. 432.
(2) Law Rep. 5 Eq. 91.
(3) 2 Atk. 515.
(4) Ibid. 296.
(5) 5th Ed. vol. i. p. 188.

which, upon these pleadings, he ought to be brought here and made a party by the *Stennings*, and on that ground alone, without reference to any other objection, I am of opinion that he is entitled to have the demurrer allowed.

The demurrer by the Defendant *Wagner* to the amended statement of claim was then argued.

Robinson, Q.C., and *Fellows*, for the demurring Defendant.

Eddis, Q.C., and *Morshead*, for the Plaintiff.

HALL, V.C.:—

Judgment, V.-C. H.

I do not think that this is a case which was meant to be provided for by any of the rules which have been referred to, or by Act of Parliament itself.

The case made by the Plaintiff is not against *Wagner* at all. He says that what *Wagner* did was right; but he says, "If I fail in what is the real substance of my contention, I may have an action for damages against you, and to provide for that contingency, which is a possible contingency, that I may fail in my suit against *Stenning*, I will make you a Defendant to what is substantially another action, claiming damages against you." I do not think the rule was meant to embrace two such inconsistent cases in one proceeding. It may be that the Plaintiff may have power under some of the rules to give notice to *Wagner* of these proceedings, and possibly in that way he may be at liberty to intervene, or may be bound by these proceedings as a foundation for a subsequent action, if that should be requisite, and the various orders which have been referred to may have reference to such a course. In *Ex parte Smith* (1), the Court of Bankruptcy was proceeding to deal with the case, and it was considered that it could not be dealt with satisfactorily in the Court of Bankruptcy, because all the parties could not be there, and could not be bound by the proceedings, and in disposing of the case reference was made to the 18th rule of Order XVI., as one which would probably be acted upon under the circumstances. But that is only a rule

(1) 2 Ch. D. 51.

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which provides for notice being given by leave of the Court or the Judge, and there the Court has a discretion as to whether, under all the circumstances, leave shall be given, and a Defendant can only attain part of this object by that proceeding; because although the party might be bound by the proceedings, and that might be made the foundation for a subsequent claim, it does not follow that relief would be given in that action. That seems to have been the view of Lord Justice *Mellish* in *Ex parte Smith* (1), as appears from his observations, which are fully reported in the Law Journal.

That being so, it seems to me that I cannot in a case of this kind give the go-by substantially to those rules which enable you to give notice to parties by allowing a person to be made a Defendant. I do not think it was meant so far to alter the old rule in pleading as to couple two such cases as these in the same pleading and action; and in that respect I am confirmed, I think, by the decision of the Master of the Rolls in *Evans* v. *Buck* (2). No doubt that was a case of counter-claim, and his decision specially applied to that; but still his observations are very general as to the intention not to part with the old rule against having two inconsistent cases upon the record. It seems to me, therefore, that this demurrer of *Wagner's* is well founded, and must be allowed.

C. A. The Plaintiff appealed from the order allowing the demurrer to the amended statement of claim. The appeal was heard on the 18th of April.

Argument. *Eddis*, Q.C., and *Morshead*, for the Appellant:—

The 3rd and 6th rules of Order XVI. are clearly applicable to such a case as this. There is no restriction in them to cases where the grounds of action against the two Defendants are inconsistent; in most cases where the relief prayed is in the alterative, the grounds of action must be inconsistent. *Evans* v. *Buck* was a case of a counter-claim. It has no application to a statement of claim, which is distinctly governed by the rules. The point has been expressly decided in *Honduras Inter-Oceanic Railway Company* v. *Tucker* (3). *Ex parte Smith* is in our favour.

(1) 2 Ch. D. 51. (2) 4 Ch. D. 432.
(3) 2 Ex. D. 301.

Robinson, Q.C., and *Fellows*, for the Defendant *Wagner*:— C. A. 1877 CHILD v. STENNING. Argument.

The Legislature did not intend to alter the old rules of pleading, which prevented Plaintiffs from seeking inconsistent relief against two Defendants in the same suit. There may be many cases to which the 3rd rule may be applicable, where the alternative relief is not inconsistent, as in the case of an action against principal and surety. Although *Evans* v. *Buck* (1) was a case of counter-claim, yet the *ratio decidendi* applies to statements of claim by a plaintiff.

JESSEL, M.R.:— Judgment, C. A. Jessel, M.R.

With all deference to the Vice-Chancellor, I am of opinion that the obvious meaning of the Rules is that the Plaintiff was to bring the action in the form in which he has brought it. The Plaintiff had obtained a lease of a piece of land from the Defendant *Wagner*. The Defendants *Stenning* claim to be tenants from year to year, under *Wagner*, of a certain right over part of the land. The Plaintiff disputes the claim of the *Stennings* under *Wagner*, and says that they are mere trespassers, and that if they are trespassers he is entitled to relief by injunction and damages for past injury; and he further says, that if they are tenants under *Wagner*, he has incurred damage by *Wagner's* act, and he claims damages against him under his covenant for quiet enjoyment. He also says that it is more convenient to try both questions in one action, and so he will get a complete remedy either against *Wagner* or against the *Stennings*, in which latter case he would have to pay *Wagner's* costs. On the other hand, if there were to be two actions, he might fail in both; for in the action against the *Stennings* they might prove that they had a title under *Wagner*, and in the action against *Wagner* he might prove that they had no title, but were mere trespassers. It appears to me that this was just the mischief that was provided against by the 3rd rule of Order XVI. This is a case of alternative relief, and although in some cases a difficulty may arise by reason of there being different causes of action, that is provided for by the 1st rule of Order XVII., which was, that "if it appears to the Court or a Judge that any such causes of action cannot be conve-

(1) 4 Ch. D. 432.

C. A. 1877 CHILD v. STENNING. Judgment, C. A. Jessel, M.R.

niently tried or disposed of together, the Court or Judge may order separate trials of any of such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof." But the present case appears to be one in which both claims ought to be tried together in the presence of both *Wagner* and the *Stennings*. The demurrer ought, therefore, to be overruled.

James, L.J. JAMES, L.J.:—

I am of the same opinion. With all respect to the Vice-Chancellor, I should have thought that this was pre-eminently a case provided for by the rule in question. There is only one point in dispute, namely, whether *Wagner* has given the *Stennings* the right which they claim. If he did give it, then he is liable to the Plaintiff; if not, they are liable.

Mellish, L.J. MELLISH, L.J.:—

I am of the same opinion. It is quite plain, that by the rule power was given to a Plaintiff to bring actions against several Defendants in the alternative. That is what was done in the present case. An action has been brought against several Defendants, and the facts are such that the Plaintiff must be entitled to relief against one or other of them. The Vice-Chancellor allowed the demurrer on the ground that the causes of action are not the same. If we were to say that two persons could not be joined as Defendants unless the causes of action against them were exactly the same, the object of the Legislature would be entirely defeated. In most cases where alternative remedies are sought against two persons the causes of action are different; as in the case where an action is brought against an agent and his principal, because the Plaintiff is uncertain whether he shall be able to prove the authority given to the agent, as in *Honduras Inter-Oceanic Railway Company* v. *Tucker* (1). There the Plaintiff seeks compensation for one wrongful act, but he cannot tell which of two parties is really liable. I think it was exactly the case intended to be provided for by the rule.

(1) 2 Ex. D. 301.

BAGGALLAY, J.A.:—

I am of the same opinion.

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Solicitors for Plaintiff: *Smith, Fawdon, & Low*, agents for *C. Lamb, Brighton.*

Solicitors for Defendants: *Stibbard & Cronshey*, agents for *Woods & Dempster, Brighton.*

In re NEW GAS COMPANY.

C. A.
1877
May 9.

Company—Winding-up Petition—Costs of Creditor opposing the Petition—Shareholder's Petition.

The general rule that where a winding-up petition is dismissed the creditors who appear and oppose it are entitled to one set of costs, applies to a petition by shareholders, as well as to a petition by creditors.

Statement.

IN this case an appeal was brought from an order of Vice-Chancellor *Bacon* dismissing a petition for winding up the *New Gas Company, Limited.*

The Petitioner was a shareholder of the company, and he alleged that the company, which was established for the purpose of carrying on the manufacture of gas according to a particular process, had ceased to carry on their business within the terms of the memorandum of association for more than a year. The petition was supported by some of the other shareholders, and was opposed by the company and some of the creditors. The Vice-Chancellor was of opinion that the Petitioner had failed to establish his case, and dismissed the petition; but ordered the creditors who opposed to pay their own costs.

The Petitioner now appealed from this decision.

Argument.

Sir *H. Jackson*, Q.C., and *W. Latham*, for the Appellant.

Hemming, Q.C., and *Macnaghten*, for the company.

THE COURT (*Jessel*, M.R., *James* and *Baggallay*, L.JJ.) agreed with the Vice-Chancellor, and dismissed the appeal with costs.

Grosvenor Woods, for the opposing creditors, asked for his costs

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of appearance on the appeal as well as at the previous hearing which had been refused by the Vice-Chancellor.

Argument.

Sir *H. Jackson*, Q.C., for the Petitioner:—

The creditors have no right to appear and oppose the petition. It is no concern of the creditors whether the company is wound up or not. *In re European Bank* (1), in which the opposing creditors were allowed their costs, was a petition by creditors. But this is a petition by a shareholder, and no insolvency is alleged.

Judgment, Jessel, M.R.

JESSEL, M.R.:—

I never heard of any distinction in this respect between a shareholder's petition and a creditor's petition. The advertisement which the company was bound to issue under the General Rules of 1862 says, "Any creditor or contributory of the said company desiring to oppose the making of an order for the winding-up of the said company under the above Act, should appear at the time of hearing, by himself or his counsel, for that purpose." You have, therefore, invited the creditors to appear and oppose. I think they had a right to appear, and being successful they are entitled to one set of costs. But as the appeal is dismissed we cannot interfere with the order of the Vice-Chancellor as to the costs of the hearing before him.

JAMES and BAGGALLAY, L.JJ., concurred.

Solicitors: *J. W. Heritage; Blunt, Tebbs, & Lawford; G. S. & H. Brandon.*

(1) Law Rep. 2 Eq. 521.

In re PERCY & KELLY NICKEL, COBALT, AND CHROME IRON MINING COMPANY.

M. R.
1877
May 5.

HAMLEY'S CASE.

Company—Winding-up—Director—Qualification—Contributory.

The articles of a limited company, after naming the first six directors, provide that no person should be qualified to be a director who was not a holder of shares in the company of the nominal value of £500. The board, who had power to appoint directors, purported to appoint *H.*, who neither held nor afterwards acquired any shares. *H.* attended two meetings of the board, and resigned his office in two months. On an application by the official liquidator to make *H.* a contributory in respect of fifty shares of £10 each:—

Held, that his election as a director was void, and that he could not be made a contributory.

Statement.

THIS was an application by the official liquidator of the *Percy & Kelly Nickel, Cobalt, and Chrome Iron Mining Company*, which was in liquidation, to put Mr. *E. G. Hamley* on the list of contributories in respect of fifty shares.

The company was registered on the 1st of October, 1875, with a memorandum and articles of association pursuant to the provisions of the *Companies Act*, 1862, with a nominal capital of £120,000 in shares of £10 each.

The articles provided that the directors should not be less than five nor more than eleven, and, after naming the first six directors who were to hold office until the annual general meeting of the company in 1880, provided that the directors for the time being should have power to appoint any other person or persons to be a director or directors at any time before the said meeting. They also contained the following provision: "No person shall be qualified to be a director who is not a holder of shares or stock in the company of the nominal value of £500, and no person except the original directors, and such person as may be appointed by them under the last clause, shall be qualified to be a director who has not been a holder in his own right of such shares or stock at least six months."

On the 20th of October, 1875, the then directors, two of whom

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Statement.

were original directors and the remaining two persons appointed by them, purported to appoint as a director the said *E. G. Hamley*, who neither held nor afterwards acquired any shares in the company. He attended two board meetings, on the 4th and the 20th of December, 1875, and shortly afterwards resigned. In the prospectus of the company which was issued, and which stated the qualification of a director, his name appeared as one of the directors, but he stated in his affidavit that he had never seen the prospectus, and was not aware that the articles required any qualification.

The case came before the Court on an adjourned summons.

Argument.

Chitty, Q.C., and *H. M. R. Pope*, for the official liquidator :—

Mr. *Hamley* having been elected a director, and attended two meetings of the board, he must be presumed to have contracted himself into the liability in respect of the fifty shares which would be a director's qualification, although the shares had not been actually allotted to him. Moreover, in this case the name of *Hamley* actually appears in the prospectus as one of the directors.

[They referred to *Brown's Case* (1), *Forbes' Case* (2), and *Karuth's Case* (3).]

Grosvenor Woods, for *Hamley*, was not called on.

Judgment.

JESSEL, M.R. :—

This is one of those cases which very frequently now come before the Court, and as to which I should be very glad if there were a complete review of the authorities, which I may say are in an unsatisfactory state.

As I said in *Karuth's Case*, and I do not want to repeat it, when a man is not a registered shareholder in a company he can only become a member of the company and a contributory by contract, and then you will be entitled to amend the register accordingly.

In this case *Hamley* is not a registered shareholder; he is not on the register, and I therefore discard from consideration all

(1) Law Rep. 9 Ch. 102. (2) Law Rep. 8 Ch. 768.
(3) Law Rep. 20 Eq. 506.

the authorities which relate to the case where a director, having been registered as a shareholder, has been prevented from repudiating the registration on the ground that he did not know of it, or did not expressly authorize it. They stand on a totally different principle. In those cases the Court has implied, from his accepting the office and acting as a director, an authority to the other directors or secretary, as the case might be, to enter his name on the register for the qualifying number of shares; and if it has been done, and he has continued to act as a director, the Court will not allow him to get rid of the registration.

Another class of cases is, where a director has contracted with the company to take the shares. Now, how does he contract? If the articles of association require that every director shall have a certain qualification, and declare that he is to cease to be a director if he ceases to have the qualification, it has been said that, inasmuch as the qualification is not a condition of his being elected a director, he must be taken to have been well elected a director, and has a reasonable time to acquire his qualification shares. And it was decided in *Brown's Case* (1) that he may acquire these shares either from the company or anybody else; and therefore it is not *primâ facie* a contract with the company to take the shares from them, but a contract with the company that he will obtain the shares from the company or from somebody else.

Then there comes another consideration. Supposing the company is in such a position that it is impossible he can obtain the shares from anybody else but the company; then it may well be said, as the contract means he will acquire the shares from some one, and from the nature of the case he can only acquire them from the company, the contract must be a contract to acquire them from the company, and in that way it must be considered that he has contracted to take the shares from the company, but in that way only, as I understand.

If, however, the possession of the shares and his being a registered shareholder is a condition precedent to the man's being elected a director, he never becomes a director, the election is simply void, whether he is elected by a general meeting or whether he is nominated by other directors. He is a person who assumes

(1) Law Rep. 9 Ch. 102.

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to act as a director, without authority, in defiance of the articles. He may incur liabilities by so acting of a very serious description, but that does not make him a director. He has no reasonable time afterwards to qualify himself, because no subsequent qualification will validate his election; and he is therefore not at all within the purview of the authorities, of which *Brown's Case* (1) is the principal, which say that he is bound within a reasonable time to acquire his qualification, because he cannot acquire it subsequently. He never was a director, and he never will be a director as far as that election is concerned.

Then we have the case of a man who without any authority at all is made a director. He says, "I have incurred liabilities, but I have got no rights: why should you presume a contract against me?" The only contract you can presume, if there is any, is a contract to have obtained the shares six months before he became a director, which is quite impossible. Consequently, in cases where the man cannot be elected a director, I can find no ground whatever for imputing any contract between him and the company to take shares afterwards from the company. It appears to me, therefore, that there is no contract whatever, and, consequently, he is not a shareholder by reason of contract.

Then the only point to be considered is, whether the case falls within that clause which makes the election void. The case was this: Certain persons were nominated as original directors, and then there is this clause: "No person shall be qualified to be a director who is not a holder of shares or stock in the company of the nominal value of £500, and no person, except the original directors, and such person as may be appointed by them under the last clause, shall be qualified to be a director who has not been a holder in his own right of such shares or stock at least six months." That must mean six months before the election; it can have no other meaning.

The original directors elected two more, and the two original directors and the two more, making four in all, professed to elect this gentleman, he not having any shares. I am of opinion that the election was simply void and unauthorized; that he acted as a director, without being a director at all. He has nothing

(1) Law Rep. 9 Ch. 102.

whatever to do with the company, and he resigned, they say, within a couple of months afterwards, before the allotment of shares. That being so, it appears to me he is no contributory. Whatever liabilities he may have incurred, it is not a liability under a contract to take shares from the company.

Solicitors: *Barnard & Co.; F. W. Snell.*

WILBERFORCE *v.* HEARFIELD.

[1876 W. 297.]

Evidence—Title to Land—Tithe Commutation Map—6 & 7 *Will.* 4, *c.* 71, *s.* 64.

A tithe commutation map is not, under 6 & 7 Will. 4, c. 71, s. 64, admissible in evidence as shewing the boundary of land in a case of disputed title.

Statement.

THE question in this case related to the ownership of a certain ditch or dyke called *Setting Dyke*. The Plaintiff and Defendant were owners of lands abutting on opposite sides of the dyke, and each claimed it as part of his property.

While the trial of the action was proceeding a sealed copy of the tithe commutation map of the parish in which the dyke was situated, dated in 1841, was tendered in evidence. This map purported to shew by a dotted line the boundary of the Defendant's land, including the said dyke.

Argument.

Davey, Q.C., and *Phillimore*, for the Defendant, referred to the Act for the Commutation of Tithes (6 & 7 Will. 4, c. 71), s. 64, which provides that the map or plan annexed to the instrument of tithe apportionment shall be deemed satisfactory evidence of the accuracy of such plan. They submitted that the map was admissible in evidence of the Defendant's title, and cited *Hammond* v. *Bradstreet* (1), where the question of the admissibility in evidence on a question of title of a tithe apportionment with the map annexed to it was raised but not decided.

Chitty, Q.C., and *Phear*, for the Plaintiff, contended that the evidence was inadmissible.

(1) 10 Ex. 390.

M. R. JESSEL, M.R.:—

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Judgment.

I must reject this evidence. The tithe commutation maps were never intended by the Legislature to be evidence as between two parties of the title to land. I cannot conceive the meaning of sect. 64 to be that these maps were to be satisfactory, that is conclusive, evidence on questions of ownership.

Solicitor for Plaintiff: *G. T. Woodrooffe.*

Solicitors for Defendant: *Pritchard & Sons*, agents for *J. & T. W. Hearfield, Hull.*

M. R.

1877

Jan. 22.

CADETT *v.* EARLE.

[1871 C. 209.]

Will—Trustees—Investment Clause—"Stocks or Funds of Foreign Government"—Securities of the States of New York, Ohio, and Georgia.

A power given by will to trustees to invest "upon any of the stocks or funds of the Government of the *United States of America*, or of the Government of *France*, or any other foreign government:—

Held, to authorize investment in *New York* and *Ohio* stocks, and *Georgia* bonds.

Statement.

FURTHER CONSIDERATION.

James Cadett, by his will, dated the 1st of October, 1829, bequeathed the sum of £20,000 to trustees upon trust to invest it "upon any of the Government stocks or funds of the United Kingdom of *Great Britain and Ireland*, or other Government securities, or upon any of the stocks or funds of the Government of the *United States of America*, or of the Government of *France*, or any other foreign government," with power to vary such investments for others of the like nature; and to pay the income of the trust funds to his daughter, the Plaintiff, *Harriett Cadett*, during her life for her separate use.

After the testator's death, which happened on the 17th of February, 1830, his trustees set apart out of his estate certain stock of the State of *New York* to answer the above legacy. The stock was afterwards redeemed, and the money reinvested by the trustees in *Ohio* Stock and *Georgia* Bonds.

A loss having resulted to the trust estate from these investments, this suit was instituted by the testator's daughter for the execution of the trusts of the legacy, the question being whether the several investments were authorized by the will.

Argument.

Chitty, Q.C., and *W. Barber*, for the Plaintiff:—

The question is, whether these investments can be considered as "stocks or funds of a foreign government." Though the *United States of America* are, in the aggregate, a foreign government, it seems doubtful whether any one of those States can be distinctively termed a "foreign government." In *Hull* v. *Hill* (1) Australian bonds were held not to pass under a gift of "foreign bonds." *Ellis* v. *Eden* (2) may be cited as an authority against our view, for there Virginian and *Maryland* bonds were held to fall within the description of "stocks in the foreign funds." But there the description was general; here the words "any other foreign government" indicate a foreign government similar to those of *France* and the *United States*, which the testator had just mentioned.

Fischer, Q.C., and *O. L. Clare*, for the Defendants, the trustees.

Caldecott, *G. O. Edwards*, and *Hemings*, for other parties.

Judgment.

JESSEL, M.R.:—

I am of opinion that the trustees were authorized to make these investments. In the first place, there is no doubt that they acted *bonâ fide*, and that, in construing this investment clause, containing a power to invest in the stocks or funds of a "foreign government," they read it in the same sense as ordinary business men would read it, that is, as an authority to invest in foreign securities generally; and unquestionably, as a matter of fact, securities such as these are usually included by business men under the head of "foreign securities."

But the question is whether the term "foreign government" really includes states forming part of what is known as the Government of the *United States?* Each of these States is ruled over by a government—an actual government in every sense

(1) 4 Ch. D. 97. (2) 23 Beav. 543.

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of the word. Why, then, should it not be regarded as a foreign government, that is, a government not under the jurisdiction of this country; for that is the meaning of the word "foreign"? That being so, the word "foreign" is satisfied, and the word "government" is also satisfied.

But it is said that the "foreign government" referred to by the testator is one of a peculiar character, and that, in order to ascertain what sort of government it is to which he refers, you must apply the maxim, *Noscitur a sociis*. Why, when a man makes use of the word "government" generally, should he be held to mean a government of a peculiar character, simply because in the context he mentions certain governments specifically—and to which of the *socii* are you to refer? Here the *socii* vary enormously. For instance, the attributes of the "Government of *France*" vary in most important particulars from those of the "Government of the *United States of America*." To say that I am to take one only of the *socii* as a guide to what the testator means by the word "government" cannot be right.

I am not prepared to define precisely what investments the testator means by "stocks or funds of a foreign government;" but it is an acknowledged fact that the stocks or funds of the Government of *Bavaria*, for instance, though it is subordinate to the Government of *Germany*—just as the Governments of *Georgia* or *Ohio* are subordinate to the Government of the *United States of America*—are "stocks or funds of a foreign government;" and no one would say that a trustee having power to invest on the securities of a foreign government was chargeable for a breach of trust for having invested in the stocks or funds of the Government of *Bavaria*.

It seems to me that you must give a fair workable interpretation to the words the testator has used, and that there is no reason why the words "or any other foreign government" should not be extended to the Governments of the States of *America* separately. I hold, therefore, that the trustees were justified in making these investments.

Solicitors: *W. W. Comins; Chester & Co.; Mackeson, Taylor, & Arnould; W. B. Brook.*

ORIGINAL HARTLEPOOL COLLIERIES COMPANY *v.* GIBB.

M. R.
1877
Jan. 31;
Feb. 1, 5.

[1875 O. 3a.]

Navigable River—Riparian Owner—Access to Wharf or Dock—Obstruction—Injunction—Rules of Court, 1875, *Order* XIX., *r.* 3—*Counter-claim—Damages accruing after Date of Writ.*

A navigable river is a public highway, navigable by all Her Majesty's subjects in a reasonable manner and for a reasonable purpose. Accordingly a riparian owner has a right to moor a vessel of ordinary size alongside his wharf for the purpose of loading or unloading, at reasonable times and for a reasonable time; and the Court will restrain by injunction the owner of adjoining premises from interfering with the access of such vessel, even though the vessel may overlap his own premises; though such vessel would not be allowed to interfere with the proper right of access to the neighbouring premises if used as a wharf, nor to the free entrance to or exit from such premises, if used as a dock, by other vessels.

When a Defendant delivers a counter-claim under Rules of Court, 1875, Order XIX., rule 3, any damages thereby claimed must be limited to the date when the writ was issued.

Statement.

THE Plaintiffs, who were coal merchants, were lessees and occupiers of a wharf known as *Keepier Wharf*, abutting on the River *Thames* at *Ratcliff*, having a frontage of 125 feet on the river. On the west side of the said wharf was a wharf and a dock known as *Ratcliff Cross Dock*, occupied by the Defendant, and abutting on the river. On the east side of *Keepier Wharf* was a public landing place projecting on the river, and preventing any vessel lying alongside the said wharf from overlapping on the east side of such wharf.

The Plaintiffs issued their writ on the 25th of November, 1875.

The statement of claim alleged that the Plaintiffs, in the ordinary course of their business, employed a steam collier known as the *Ludworth*, which was brought alongside their wharf for the purpose of unloading, and that this vessel, being 175 feet in keel, and not being able to overlap on the east side of the wharf, was obliged to overlap the adjoining wharf of the Defendant.

It was further alleged that the Defendant had lately moored or attached by iron chains to the extremity of his wharf next to that

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Statement.

of the Plaintiffs' large wooden obstructions, and that such obstructions floated on the river when the tide was up, and projected for some distance into the river, and prevented the Plaintiffs from bringing the *Ludworth* alongside their wharf and there unloading it; that such obstructions amounted to a public nuisance, as interfering with the navigation of the river, and the Plaintiffs had requested the Conservators of the *Thames* to remove them, but they had declined to interfere; and that such obstructions occasioned special and serious damage to the Plaintiffs.

The Plaintiffs claimed that the Defendant might be restrained from allowing the said obstructions to remain so as to prevent the *Ludworth* from coming and remaining alongside their wharf for the purpose of unloading; and that the damage sustained by the Plaintiffs from the acts of the Defendant might be assessed and paid to them by the Defendant.

An interim injunction was obtained by the Plaintiffs.

The Defendant, by his statement of defence and counter-claim, delivered the 6th of March, 1876, stated that the entrance to his dock, called *Ratcliff Cross Dock*, was 41 feet wide, and the east side of such entrance was 48 feet distant from the west side of *Keepier Wharf;* that the *Ludworth*, when moored alongside *Keepier Wharf*, overlapped the Defendant's wharf and dock 52 feet, her stern extending 5 feet in front of the dock gates, and at low water she lay on the foreshore between high and low water, and rested on the campshed and piles in front of the Defendant's wharf; that the wooden obstructions referred to in the statement of claim were merely an ordinary raft of timber for the use of the Defendant; that it had always been the custom on the River *Thames* for owners of dry docks to moor such rafts of timber in front of their wharves, and that the Defendant's raft was so moored by permission of the Conservators of the *Thames*. The Defendant denied that the raft was a public nuisance or occasioned any damage or loss to the Plaintiffs.

The Defendant, by way of counter-claim, stated that the Plaintiffs had on several occasions moored the *Ludworth* so as to overlap the Defendant's wharf, and so moored her at unreasonable times, and kept her so moored for an unreasonable time, thus depriving the Defendant of all access to, and the use of the frontage to that

part of his wharf which lay between his dock gates and the Plaintiff company's wharf, and was a serious and dangerous obstruction to the access to the Defendant's dock, and vessels entering and leaving the same were exposed to great risk of collision with the steamer, and that by reason of such obstruction the Defendant was obliged to employ more time and labour in docking and undocking ships than would otherwise be necessary. The Defendant alleged that on one occasion the *Ludworth* remained moored for twenty hours, thereby greatly delaying the undocking of a vessel.

The Defendant claimed that the Plaintiffs might be restrained by injunction from mooring the *Ludworth*, or any other vessel, so as to obstruct the access to the Defendant's dock and wharf; secondly, that if the Court should be of opinion that the Plaintiffs were entitled so to moor their steamer or other vessel, that they might be restrained from doing so except at reasonable times, and from keeping it so moored, except for a reasonable time; thirdly, that damages might be awarded to the Defendant in respect of the wrongful acts of the Plaintiffs.

It appeared that there had been for a considerable time an agreement between the Plaintiffs and the Defendant, under which the Plaintiffs were authorized to berth the *Ludworth* opposite their wharf at a distance of about twenty-five feet, but not so as to interfere with the access of vessels to and from the Defendant's dock. This agreement expired on the 10th of October, 1875.

Witnesses were examined on behalf of the Plaintiffs and the Defendant. It appeared that the Plaintiffs' wharf had been used for the purposes of their trade for twenty-three years; that the steam-collier though overlapping the Defendant's wharf did not, in fact, interfere with access thereto, inasmuch as the Defendant admitted that he did not use the premises for the purposes of a wharf. The Defendant said that the raft complained of by the Plaintiffs was a raft of timber logs used for the purpose of his business as a repairer of ships, but admitted that after the said agreement came to an end it was attached to his wharf in such way as to obstruct the access of the collier to the Plaintiffs' wharf.

With regard to the alleged interference with the access of vessels to and from the Defendant's dock, according to the Defendant's evidence, about seventy vessels came in and out of his dock

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in the course of the year: sometimes two vessels entered or left the dock the same day. The time when free access was required to the dock-gates was two hours and a half or three hours before the flood tide. Evidence was adduced for the purpose of shewing that when the collier was at her moorings there was greater risk to vessels entering or leaving the dock than at other times, and that the employment of additional hands had occasionally been rendered necessary.

Argument.

Roxburgh, Q.C., *Caldecott*, and *Edward Ford*, for the Plaintiffs:—

The Plaintiffs, as the owners of a wharf on a navigable river, have in common with all the other riparian owners the right of free and uninterrupted access to their own property. This right has been interrupted by the Defendant's raft obstructing the access of the steam collier belonging to the Plaintiffs, when it was necessary for the purposes of unloading that she should be moored alongside the *Keepier Wharf*. This is an interference with a private right which entitles the Plaintiffs to come to the Court for relief. In the recent case of *Lyon* v. *Fishmongers' Company* (1) it was held that the right of navigating a tidal river is common to the subjects of the realm, but it may be connected with a right to an exclusive access to particular land on the bank of the river, and the latter is a private right to the enjoyment of the land, the invasion of which may form the ground for an action for damages or for an injunction. The same principle applies here.

In *Reg.* v. *Leech* (2) it was held to be an indictable nuisance to bring a large ship of 300 tons into a common dock free to all ships of a smaller size. In an analogous case of *Rex* v. *Cross* (3), where stage-coaches stood for a long time in a public thoroughfare waiting for passengers to the inconvenience of private carriages, it was held to be a nuisance. In *Rose* v. *Groves* (4), where the owner of a public-house abutting upon a navigable river brought an action against a man who had put timbers on the river, so as to drift opposite the house, thus obstructing the access to the house, it was held to be a private injury to the owner.

The Defendant, by his counter-claim, complains of the access

(1) 1 App. Cas. 662.
(2) 6 Mod. 145.
(3) 3 Camp. 224.
(4) 5 Man. & G. 613.

to his dock being impeded by the steamer overlapping the entrance to the dock, but the Plaintiffs are clearly entitled to bring their collier alongside the wharf, although it is of greater length than the frontage of the wharf, as they cannot be restricted to the use of a vessel of only 125 feet in length. The only ground of complaint would be if the vessel remained there an unreasonable time, so as to interfere with access to the dock. This is quite unsupported by the evidence. It appears that the premises are never used by the Defendant for the purposes of a wharf. We contend, therefore, that the Plaintiffs are entitled to an injunction, and that the Defendant cannot sustain his counter-claim.

Chitty, Q.C., *Laing*, and *R. E. Webster*, for the Defendant:—

The Plaintiffs are not entitled to any injunction in respect of the raft which, as they allege, obstructs the access to their wharf. They, by their obstruction of the entrance to the Defendant's dock, are themselves committing an unlawful act which the Defendant is entitled to prevent by any means in his power. Besides the obstructions complained of were logs of wood fastened together as a raft, and the Defendant was entitled to have them for the purpose of his trade as a repairer of ships, and, further, he was entitled to attach them to his wharf for the purpose of preventing the collier from becoming an obstruction to the ships entering or leaving the dock. There has been no interference with the Defendant on the part of the Conservators of the *Thames*, who would have removed the raft had there been sufficient cause.

It is not denied that the Plaintiffs can exercise their right to navigate the river and to moor their vessel alongside their wharf; but it is a misuse of their right to moor a vessel of such a length that access to the Defendant's dock is rendered dangerous or difficult. At any rate, even admitting that they are entitled so to moor the vessel, they can only exercise their right at reasonable times, and they cannot be allowed to keep it there to the injury of the Defendant for any length of time they please.

In *Benjamin* v. *Storr* (1), where the Plaintiff kept a coffee house, and the Defendants were constantly loading and unloading vans, which intercepted the light from the Plaintiff's coffee shop to

(1) Law Rep. 9 C. P. 400.

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such an extent that he was obliged to burn gas nearly all day, and access to the shop was obstructed by the horses standing in front of the door, it was held that the evidence disclosed such a direct and substantial private and particular damage to the Plaintiff beyond that suffered by the rest of the public, as to entitle him to maintain an action.

Argument.

A question arose in the course of the hearing whether it was competent to the Defendant, in support of his counter-claim, to go into evidence to shew that he had sustained damage after the 25th of November, 1875, the date when the writ was issued, or whether he could shew that he was entitled to damages up to the date of the counter-claim, namely, the 6th of March, 1876.

Chitty referred to Rules of Court, 1875, Order XIX., rules 3, 10, and Order XX., rule 1, and contended that the Defendant could shew damage up to the latter date.

Roxburgh, for the Plaintiffs, contended that no damage could be claimed by the Defendant after the date of the writ.

Judgment.

JESSEL, M.R.:—

4 CPD 384

My present impression is, that it is confined to the date of the writ. A counter-claim, as I understand it, is to entitle the Defendant who has a claim against the Plaintiff, either in debt or damages, to set it off against the Plaintiffs' claim so as to destroy it in one action or to get in a surplus if a surplus is coming to him, and not to bring a second action. Of course where it relates to the same matter, it is very convenient to try it at the same time; and where it does not relate to the same matter, it may be inconvenient to try it, and the Court may refuse permission under the 3rd rule of Order XIX. That being the position of the counter-claim, the meaning of the Order is that it should have "the same effect as a statement of claim in a cross action." In what cross action? It obviously means in the original action. Where a Plaintiff issues a writ for damages he claims damages up to the time of issuing his writ, and where the Defendant brings a counter-claim for damages it is his statement of claim in the same action, and that is up to the issuing of the writ

and, as far as I can see, it being a cross claim and not a defence to the original claim, there is no reason why, if he adopts the Plaintiffs' writ, he should go beyond the issuing of the writ for damages, because that would not be justice. If the Defendant can get damages in respect of another matter up to the date of his counter-claim, the Plaintiff ought to have the same right so as to increase his damages, to do justice. If it is a continuous act, injuring the Plaintiff, and the Plaintiff says, "I am entitled to £500 damages up to my writ and £500 more to the time of your putting in your counter-claim," and the Defendant says, "I am entitled to £600 damages subsequently to the issuing of the writ," he would get a verdict for £100; although the Plaintiff is entitled to the £500 damages he is estopped and the other is not.

That does not seem to be consistent with justice. When I come to look at Order xx. I find it relates to "Pleading matters arising pending the action." If it was intended that the counter-claim should include matters pending the action, it would have said so; but I find it is carefully restricted by rule 1: "Any ground of defence which has arisen after action brought, but before the Defendant has delivered his statement of defence, and before the time limited for his doing so has expired, may be pleaded by the Defendant in his statement of defence, either alone or together with other grounds of defence. And if, after a statement of defence has been delivered, any ground of defence arises to any set-off or counter-claim alleged therein by the Defendant, it may be pleaded by the Plaintiff in his reply, either alone or together with any other ground of reply." So that it is carefully restricted to defence, either to an action or to a counter-claim. The only way that I can see in which you could allege a counter-claim for matters up to its date would be by saying that the counter-claim was a defence; but that is not the way it is treated throughout the rules. It is always treated as a cross action, not as a defence but a true cross action; the rule being that you must set off damages in the cross action against the damages in the first action. It seems to me, therefore, that you cannot bring your counter-claim for damages which accrued after the writ, any more than the Plaintiff can get damages that accrued after the writ. By the leave of the Court you can do anything. That is another matter; because

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the Court can give leave to amend on both sides, and can easily amend the writ. That being my opinion upon the general rule, I think in strictness that no action for damages, or cross action for damages, can be maintained by the Defendant after the writ. But I will let the evidence go in, in order that if the Defendant is desirous of taking another opinion upon the subject he may do so, and, therefore, I will let him give evidence of damage up to the date of his counter-claim.

It appeared that there was only one instance in which damage was alleged between the date of the writ and that of the counter-claim, so no further evidence was gone into on that point.

JESSEL, M.R., after some observations as to the conduct of the parties, continued:—

What is the law, first of all, as regards obstruction? The Plaintiffs say in effect, "The *Thames* is a public highway navigable by all Her Majesty's subjects in a reasonable manner and for reasonable purposes, and the Defendant has no right to obstruct the highway." The first question is, do the Plaintiffs navigate it in a reasonable manner and for a reasonable purpose? Unquestionably they do. The vessel they use is not a long vessel compared with others in the trade for which it is used. It is not denied that it is a vessel of ordinary length. Some are longer and some are shorter. It is a reasonable vessel for the purpose. It comes for a reasonable and proper purpose, to bring coal to the *Thames*, where coal has been delivered now for ages; and it comes to a wharf which has been used certainly for twenty-three years, and probably for longer, as a coal wharf. Therefore, they are using the river for a reasonable purpose with a reasonable vessel and in a reasonable way. They have a right to go to their own wharf, and not the less a right because in mooring the vessel out in the stream, twenty-five feet from the shore, that vessel projects over some other wharf or some other part of the shore. There is no law which says that your vessel shall be the exact length of your wharf and no longer, any more than there is any law that your carriage, or your waggon shall be the exact length of the breadth of your door, or your frontage to the street. It is not

illegal to bring in a coal waggon which is a good deal longer than the frontage of your house, in front of your house to deliver the coal; otherwise people who have small houses could never have a coal waggon full of coals. Nobody says that anything of the sort is illegal. Consequently, all that they have done was perfectly legal, perfectly right, and perfectly usual; subject to what I am going to say.

In ascertaining, however, the reasonableness of the acts of the Plaintiffs, one consideration must not be overlooked. Besides a reasonable right of access, they have a reasonable right of stopping, as well as of going and returning in the use of the highway. But what is a reasonable right of stopping? That must depend upon circumstances. You cannot lay down *à priori* what is reasonable. You must know all the circumstances. It would be clearly reasonable, for instance, if a wheel came off an omnibus in the middle of a highway, for a blacksmith to be sent for to put the wheel on the omnibus if that were the easiest mode of moving it out of the way, and the omnibus might lawfully stop there until the wheel was put on in order to take it out of the way, if that were the best mode of taking it out of the way and a reasonable and usual mode. Nobody would deny that if the blacksmith chose to carry on his trade of repairing omnibuses immediately opposite his own house, and for that purpose, not keeping any one omnibus more than a reasonable time for his work, he kept omnibuses opposite his house or shop, or smithy-door for that purpose, that would be an obstruction of the highway, and would be a nuisance. You must look at the circumstances. So, again, it is perfectly reasonable that *A.* shall put his carriage before his house door, even although it may overlap his neighbour's door. For instance, take the houses which have been divided—houses in *Portland Place*—that is a familiar instance to me, and I dare say to most of us—where two doors immediately adjoin. It is impossible to draw up a carriage to the one without overlapping the other. There is no doubt that it is quite a reasonable thing to stop a carriage there for the purpose of taking up and setting down, or even for the purpose of waiting there a reasonable time. But suppose the neighbour's carriage comes up, and wants either to take up or to set down, it would be monstrous to hold that the coachman of the first carriage

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should not move out of the way. It would then become unreasonable. When he sees the neighbour's carriage coming up, he is then bound to get out of the way, and he commits a private nuisance to his neighbour, in the nature of a public nuisance, by stopping before his door and preventing his coming up, he not requiring to stop there. In that case, therefore, if he persisted in doing this day after day, I have no doubt that his neighbours might bring an action against him and get, no doubt, nominal damages; but nominal damages would establish the right and carry the costs. That is a simple illustration of what I mean.

In the same way it is not unreasonable that your neighbour should give an evening party occasionally and that there should be a file of carriages running across your door or opposite your door. But it would be very unreasonable if anybody did not break the file to allow your carriage to come up to your own door, and still more unreasonable, if, instead of giving parties occasionally as people do, your neighbour were to turn his house into an assembly room or for some private purpose, in consequence of which a file of carriages came every day and obstructed the carriage-way to your house. I only give these as illustrations. The law is quite clear. The question of reasonableness has been said to be a question for a jury. It must be reasonable user and nothing else.

Let me try this question of reasonable user as regards the collier, as I will afterwards with respect to what is alleged in the counter-claim. Is it reasonable, when there are two wharves on the *Thames* and one man has a wharf of a certain length and another of a certain length, and the length of one wharf is less than the length of the steam collier which comes opposite to it, that that steam collier should stop opposite the other man's wharf and impede the access thereto? I say that is utterly unreasonable: each man has a property in his wharf, a profitable property, and he has a reasonable right of access, the same as his neighbour; and, therefore, if he were using the wharf for vessels alongside of it as the other was using the wharf for vessels alongside of it, what right has the one to impede the access of the other? As a general rule he has no such right. Where, however, the one is not using his wharf for that purpose, which is the case here, he cannot object

to his neighbour's vessel lying opposite in the river, because it does not injure him. If this Defendant had been carrying on the business of a wharfinger and using it for vessels coming up, I should have held it most unreasonable for the collier to stand in the way to prevent his carrying on his trade in the regular way. It would be, in fact, an attempt by the Plaintiffs to appropriate, without payment, the use of the Defendant's wharf when both were carrying on the trade. But, in the present case, it is not so. The Defendant has never used his wharf as a wharf, but has merely made use of his property in a legal way, as he has a right to do, as a kind of dry dock for the repairing of vessels, and the only access he wants is useful and commodious access for his vessels through the gates of the dry dock when he is docking and undocking vessels. It follows from what I have said, that the Plaintiffs have no right to come there and stop there so as to impede that access. If they do come there and stop there before his wharf so as to impede his reasonable access to his dock-gates, I should say they were committing a nuisance and liable to an action.

What does that mean? It means this, that they must not stop opposite to the entrance of the Defendant's dock during the hours he wants it. He does not want it every day. This is proved in evidence by himself.

His evidence shews that he uses his dock for about 100 days in the year. It follows that every other day in the year except those 100 days the Plaintiffs have a clear right, which ought not to be interfered with; because the Defendant does not use his wharf for any other purpose, and even on these 100 days he does not want it all day. According to his account, he wants it for two hours and a half or three hours before the flood tide.

Therefore the steamer has a right to be there, as far as he is concerned, for all the other hours of the day. But supposing it is there opposite his dock gates when he wants to dock and undock, it ought to go out of the way. It has no right to be there, and when it is asked to go out of the way it should go out of the way; and even without asking, when they see that a vessel is coming up to be docked or undocked, it ought to go out of the way. But, still, it has a right to be there, moving out of the way when it is impeding the access. It is merely lying in the river, a public

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highway, for a lawful purpose—for discharging its cargo—and therefore it has a right to be there. That being so, it follows from what I have said that the Defendant had no right to stop the access of the vessel to its berth. The steam collier had a right to go to her berth, a right to navigate the river, and be in the river, and she had a clear right to do so two-thirds of the days in the year, and for nine-tenths of every day of the remaining 100 days. Now, what the Defendant has done is this: he has stopped her getting there at all. He has put an obstruction in the river which prevents her getting there any day of the year or at any time, which clearly is wrong. As to the way the obstruction is fastened, that does not matter. The Defendant himself said it was fastened to the wharf in such a way, and purposely so fastened, that the Plaintiffs' vessel could not get up at all to her berth. It was intended to be so. That was clearly an illegal obstruction in the public highway.

One need not discuss the exact nature of the obstruction, or how it was fastened, because it was admitted that it was fastened in such a way as to prevent, and did prevent, the collier getting up. Therefore that obstruction was unlawful.

I will notice the two justifications, or attempted justifications, which were made for putting it there. First of all, it was said that it was put there, being in fact a raft of timber logs which were used by the Defendant in his business as a repairer of ships, and that he had a right to put his logs there. That, in my opinion, is no defence at all. You have no right to obstruct a public highway; whether it it useful to yourself or not, that is quite immaterial. It is no answer to say that you use it for carrying on your business. The answer is, that the *Thames* is not a timber pond. You have no right to make that use of the *Thames*, which is a navigable highway. No doubt it may be done where it does not interfere with the access of the public—it may happen on other parts of the river, where it does not interfere with the vessels going or returning, passing or repassing, because the Conservators may not interfere, and may allow you to moor timber. But it is quite plain that that is not the proper mode of using the highway. It is not a reasonable use of the highway to keep your timber logs there for a longer time than is necessary to take them to

your dock. You must not keep them there as a reserve, to be used in the same manner as a timber dock. It is no answer at all. Then, if you do moor timbers there, you must not fix them in such a way that vessels cannot get up to the adjoining wharf; because the real point in the case and the *gravamen* of the charge against the Defendant is that he prevents the access of the Plaintiffs' vessel. Therefore his so fixing the timber would be wrong.

The other ground of defence which struck me as a very odd one was this, that the Defendant knew the Plaintiffs' vessel would stay there for a long time, and therefore he had a right to obstruct her. The answer is, he could not know it beforehand, because, as I have said before, he might have obstructed her for every day in the year, at least for two-thirds of the days, when it would have been no injury to him if she did not stay an unreasonable time, and, even on other days how could he tell beforehand that she was going to stay an unreasonable time? It seems to me to be no defence whatever as regards the Plaintiffs' action, which, in my view of the law, is an undefended action.

Now, I come to the counter-claim. I have already ruled that the counter-claim, as regards damages, is confined to the writ. The counter-claim is founded, as I understand, upon nuisance. I have already said that if even less than is alleged in the counter-claim were proved the Defendant would be entitled to succeed in the action. I do not say that it is necessary to prove a case of danger. Interference with reasonable access to his own property is, in my own opinion, such a nuisance as would maintain an action. But as a good deal of evidence has been gone into upon that point of danger, I must say that, in my opinion, although I think there was some slight additional risk, there was really nothing of any importance as regards danger; and I think the Defendant's own conduct shews it. He is a reasonable man of business; and if there were any serious danger he would not have allowed the vessels to be docked and undocked whilst the collier was there. I think more of men's conduct than men's opinions. But, as regards expense, there is clearly additional expense. The Plaintiffs have no right to impose even an addition of two men for two or three hours on the Defendant; and they have no right, as I said before, to interfere with his reasonable access, and if this

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had been proved, I should have given, no doubt, very small damages; but I should not have granted an injunction, for this reason, that the Plaintiffs do not claim a right to obstruct. They deny the obstruction.

This being the state of the matter, although I think the Defendant's contention reasonable to this extent, that he has a right to say that the Plaintiffs shall not deprive him of a valuable property which belongs to him by keeping their collier opposite his wharf for an unreasonable time and for an unreasonable purpose, still as he has not made out that case at present, there are no grounds upon which I can give him judgment on his counter-claim.

Therefore, all that remains for me is to make the injunction, which I have already granted, perpetual, and to give the Plaintiffs the costs of the action.

Solicitors: *Harcourt & Macarthur; Markby, Tarry, & Stewart.*

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WRIGHT *v.* MONARCH INVESTMENT BUILDING SOCIETY.

[1876 W. 379.]

Building Society—Rule as to Reference to Arbitration—Motion to stay Proceedings in Action—Jurisdiction of Court—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 11—*Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *s.* 34.

The rules of a building society incorporated under the *Building Societies Act*, 1874, provided, pursuant to sect. 16, sub-sect. 9, of the Act, that disputes between the society and any of its members should be settled by reference to arbitration. A member of the society having commenced an action for account against the society:—

Held, on motion to stay proceedings under the *Common Law Procedure Act*, 1854, s. 11, and the *Building Societies Act*, 1874, that the jurisdiction of the Court was ousted, and that the matters in dispute must be referred to arbitration.

Statement.

THE Defendant society was a society incorporated pursuant to the *Building Societies Act*, 1874 (37 & 38 Vict. c. 42).

The Plaintiff, by his statement of claim, alleged that it was so incorporated, that its rules were duly certified according to law,

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and that its object was to raise by the subscriptions of its members a fund for making advances to members on security of freehold, leasehold, or copyhold estates by way of mortgage; that in 1867 the Plaintiff, who was a member of and a shareholder in the society, had mortgaged to the society certain ground rents and leasehold premises to secure the repayment of various sums amounting together to £11,350 by monthly instalments; that the instalments which the Plaintiff had paid for a time had become in arrear; that the Plaintiff, being desirous of disposing of the mortgaged property, in 1876 entered into an agreement for the sale thereof, and thereupon applied for an account of what was due to the Defendant society, but that such account was not furnished till the time had arrived for the completion of the sale; that the Plaintiff then, in order to make a title to the purchaser, paid under protest certain sums claimed by the society without having time to investigate the accuracy of the account rendered. The Plaintiff now alleged specific errors in the account, and claimed that an account might be taken of all sums of money (including rents and profits) received by or come to the hands of the society in respect of the premises for or on account or for the use of the Plaintiff, and of the application thereof, and of all dealings and transactions of the society with the Plaintiff, and that the society might be decreed to pay to the Plaintiff what should be found due to him, and be disallowed any sums sought to be charged by them as fines during the time they were in possession of the premises, and for consequential relief.

Statement.

The rules of the society included one to the effect that all disputes between the society and any of its members should be settled by reference to arbitration, pursuant to the *Building Societies Act*, 1874, s. 16, sub-s. 9, but that rule was not specifically referred to in the statement of claim.

The present motion was made on behalf of the society that all proceedings in the action might be stayed, and that the matters in question might be referred to arbitration pursuant to the rules of the society.

Beaumont, for the Defendant society, in support of the motion:—

Argument.

The Plaintiff, as a member of the society, is bound by its rules,

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one of which provides that all questions such as that which forms the subject-matter of the present action shall be settled by arbitration. The fact that this rule is not mentioned in the statement of claim will not prevent the Court from enforcing it. In *Thompson* v. *Planet Benefit Building Society* (1), it was held that the Court was able to take judicial notice of the rule of the society for referring disputes to arbitration, though it was not set out in the bill.

The rule of the society is in accordance with the provisions of the *Building Societies Act*, 1874, s. 16, sub-s. 9, and, having regard to sects. 21, 34, and 35 of that Act, and to the *Common Law Procedure Act* (17 & 18 Vict. c. 125), s. 11, the Defendants are entitled to apply to the Court that the proceedings in the action may be stayed: *Willesford* v. *Watson* (2).

[He was stopped by the Court.]

Mulligan, for the Plaintiff:—

The application of the Defendant society should have been by demurrer, as in *Thompson* v. *Planet Benefit Building Society*, though that case is not an authority for the present motion, as it was decided with reference to statutes which had been repealed even at the date of the decision, namely, 10 Geo. 4, c. 56, s. 27, which was extended to building societies by 6 & 7 Will. 4, c. 32, s. 4, and was repealed by 18 & 19 Vict. c. 63, s. 40. The Plaintiff could have maintained his action prior to the *Building Societies Act*, 1874; and it is not distinguishable from *Fleming* v. *Self* (3); *Smith* v. *Lloyd* (4); *Doubleday* v. *Hosking* (5). The old Acts being repealed, the *Building Societies Act*, 1874, did not re-enact those clauses which made reference compulsory under the former Acts, and did not contain any clause analogous to sect. 22 in the *Friendly Societies Act* (38 & 39 Vict. c. 60).

Judgment.

JESSEL, M.R.:—

I think the application of the Defendant society in this case is proper, and should be granted: I say nothing of the hardship that

(1) Law Rep. 15 Eq. 333.
(2) Ibid. 8 Ch. 473.
(3) 3 D. M. & G. 997.
(4) 26 Beav. 507.
(5) Law Rep. 15 Eq. 344, n.

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would ensue if actions of this kind could be maintained. This action is for an account. The account may be more or less complicated, still the action is merely for an account against a mortgagee, and the Plaintiff has executed certain deeds in which he has bound himself to observe the rules of the society. The rules of the society say that disputes are to be referred to arbitration, and I think this brings the case under sect. 11 of the *Common Law Procedure Act*, 1854.

I think, also, that under the *Building Societies Act*, 1874, these matters must be referred. Sect. 21 of that Act says: "The rules of a society under this Act shall be binding on the several members and officers of the society, and on all persons claiming on account of a member or under the rules, all of whom shall be deemed and taken to have full notice thereof;" and sect. 34 provides that where the rules of a society direct disputes to be referred to arbitration, the award of the arbitrators shall determine the dispute. Now it has been shewn by the affidavits of the Defendants that the rules of this society provide that all disputes between members shall be referred to arbitration, and I think in these circumstances the jurisdiction of this Court is ousted.

I cannot accede to the argument that the Act of 1874 must be construed by analogy with the decisions on the old Acts or by the provisions of the *Friendly Societies Act*. The words of the *Building Societies Act*, 1874, are in themselves sufficiently clear, and I must give effect to them without reference to anything else. The order will be that the matters in dispute be referred to arbitration pursuant to the rules of the Defendant society, the costs of the action and of the reference to be in the discretion of the arbitrators.

Solicitors: *Neal & Philpot; Learoyd, Learoyd, & Peace.*

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April 20.

ROLLS *v.* PEARCE.

[1876 R. 175.]

Special Case—Donatio Mortis Causâ—Bankers' Cheques—Appropriation by drawing against Amount of Cheques.

15 Ch D 633

A cheque drawn by a testator payable to his wife or her order, given to her shortly before his death, indorsed by her and paid into a foreign bank against the amount of which she drew:—

Held, a good *donatio mortis causâ*, although the cheque was not presented for payment at the bank on which it was drawn till after the death of the testator.

Sed quære, if the cheque had been payable to bearer.

Statement.

THIS was a special case stated for the opinion of the Chancery Division of the High Court of Justice under the Act of 13 & 14 Vict. c. 35.

The Plaintiffs were the trustees and executors of the will of *Richard Lano Pearce*, dated the 8th of November, 1870, and the Defendant was his widow, who took certain benefits under the will, subject to which the beneficiaries were the testator's two infant children.

On the 13th of October, 1871, the testator left *England* with his wife, the Defendant, and resided at *San Remo*, in *Italy*, where they remained till his death, which happened on the 7th of February, 1872.

On the 5th of December, 1871, the testator became seriously ill, and a doctor who was called in pronounced the disease a fatal one, and gave it as his opinion that he would not live many hours. But in the course of the day he rallied slightly, and called for pen, ink, and paper, and his cheque-book. The Defendant, Mrs. *Pearce*, fearing that the act of writing would fatigue and excite him, remonstrated with him, but nevertheless he filled up and signed a cheque on his *London* bankers for £100, which ran as follows:—

"34, *Old Bond Street, London.*
"5th December, 1871.
"The *City Bank, Bond Street* Branch.
order
"Pay Mrs. *Pearce* or ~~bearer~~ (*sic*) one hundred pounds.
"£100. 0. 0. "*R. Lano Pearce.*"

When the testator had filled up and signed this cheque, he tore it from the counterfoil and handed it to Mrs. *Pearce*, and he afterwards wrote some letters.

Early in the morning of the 2nd of February, 1872, the testator, who was then very weak, was visited by two friends. During the visit he asked for his cheque-book, and said that he wished to give his wife a cheque, and also desired to make a codicil to his will. One of the friends accordingly, at the request of the testator, filled up a cheque for £250 in a form exactly similar to that of the £100 cheque previously given. The same friend also wrote out on a piece of paper the following:—

"Codicil to my will. I freely give to my dear wife all my property in *San Remo*."

The cheque and codicil were then signed by the testator, and the codicil duly attested by the two friends.

The testator never recovered from his illness, and died on the 7th of February, 1872.

During the testator's lifetime Mrs. *Pearce* indorsed the cheques to "Messrs. *Asquasciati Frères*" (who were bankers at *San Remo*) "or order," and then paid them into Messrs. *Asquasciati Frères*' bank. The cheques were subsequently indorsed by them to other persons, and negotiated in the ordinary course of business, and Mrs. *Pearce* drew upon Messrs. *Asquasciati Frères* against the cheques, and, it was said, paid debts of her husband out of the proceeds.

On the 13th of February, 1872, the cheque for £250 came into the possession of the *Union Bank of London*, and was presented by them for payment at the *City Bank*, and on the 15th of February the £100 cheque came into the possession of Messrs. *Barclay & Co.*, and was by them also presented for payment at the *City Bank*.

The *City Bank*, however, refused payment of both the cheques, on the ground that as the testator (who was the drawer) had died on the 7th of the same month, they had no authority to make the payments. In consequence of this, the Defendant was obliged to refund what she had received upon the cheques.

The question was whether the gift of the cheques and their

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subsequent negotiation by the Defendant during the testator's lifetime constituted a good *donatio mortis causâ*, so as to entitle the Defendant, as the holder of them, to payment as against the Plaintiffs out of the testator's estate, notwithstanding the death of the testator before they were presented for payment.

Argument.

Glasse, Q.C., and *Hollis*, for the Plaintiffs:—

The executors do not desire to argue the point adversely to the widow. They only wish to see that the case is fairly presented.

Cheques are not in general good *donationes mortis causâ: Williams* on Executors (1), and it is for Mrs. *Pearce* to make out that sufficient was done here to constitute what would be upon the authorities a good *donatio mortis causâ*.

Locock Webb, Q.C., and *Alfred Bailey*, for Mrs. *Pearce*:—

Though there is no case precisely in point upon this question, it is in principle covered by the authorities. The donor had made a complete gift, and the donee had done all that was necessary to make the acceptance complete.

A cheque does not differ in substance from a goldsmith's bill, which in *Lawson* v. *Lawson* (2) was held to be, especially to a wife, a good gift *mortis causâ*; and *Miller* v. *Miller* (3), so far as it supports a contrary view, must be treated as having been overruled by *Tate* v. *Hilbert* (4), in which, though it establishes the rule that a note given shortly before the death of the donor, which the donee takes no steps to present or make use of in his lifetime, is not a good *donatio mortis causâ*, it is expressly laid down that where the note has been paid away for value, or applied in payment of a debt of the donee in the donor's lifetime, as has been done in the present case, there is a complete gift. In *Duffield* v. *Elwes* (5) also the test is stated to be whether the gift, as far as the donor was concerned, was completed. In *Rankin* v. *Weguelin* (6) a gift of bills of exchange to the donor's wife was supported as a *donatio mortis causâ*, and in *Boutts* v. *Ellis* (7) the same reasoning

(1) 7th Ed. p. 779.
(2) 1 P. Wms. 441.
(3) 3 P. Wms. 356.
(4) 2 Ves. 111; 4 Bro. C. C. 286.
(5) 1 Bli. (N.S.) 497.
(6) 27 Beav. 309.
(7) 4 D. M. & G. 249.

was applied to the gift of a cheque to the testator's wife. *Rankin* v. *Weguelin* (1) was also treated as the governing authority in *Veal* v. *Veal* (2). It is true that in *Hewitt* v. *Kaye* (3) a cheque was held not to be a good *donatio mortis causâ*, but that was intended as a gift to a charity, and not only was the cheque not presented, but there was no time to present it, the testatrix having died the same night on which it was given. In *Bromley* v. *Brunton* (4), where, as here, the donee had taken every possible step to perfect the gift, it was held to be good.

Glasse pointed out a discrepancy between the reports of the judgment in *Tate* v. *Hilbert* (5); the report in *Brown's* Chancery Cases seeming to make the application of a cheque in payment of a debt to be insufficient to complete a gift *mortis causâ* unless the cheque was itself paid away in the testator's lifetime.

MALINS, V.C., after referring to the facts, continued:—

The law seems to be in a very curious state. The result of the authorities appears to be that a gift of a bill of exchange, which is by its very nature payable at a future day, may be a good *donatio mortis causâ*, but the gift of a cheque is not valid unless it is presented for payment or paid before the death of the donor. I am satisfied that the object of this testator was to give these cheques to his wife. Therefore I think I ought to do all I can to make the gift good.

Now I can really see no reason why if a bill drawn on a goldsmith would be a good *donatio mortis causâ* a cheque should not be so too. A distinction has, however, been drawn between the case of a bill of exchange and that of a cheque payable to bearer, and if these cheques had been made payable to bearer and had not been presented for payment at the bank on which they were drawn before the donor's death, I should probably have considered that I was bound to hold that there was not a good gift.

But these are cheques payable to order; and it is clear that the testator knew that they could not be presented for payment either

(1) 27 Beav. 309.
(2) Ibid. 303.
(3) Law Rep. 6 Eq. 198.
(4) Ibid. 275.
(5) 2 Ves. 111; 4 Bro. C. C. 286.

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on the day they were drawn or the subsequent day. I must attribute to him the knowledge that the cheque would not be paid for some time, and on that ground I come to the conclusion that this case differs from the other cases of cheques. But I have also the decision of Lord *Loughborough* in *Tate* v. *Hilbert* (1). He there says (2): "If she had paid this away either for valuable consideration or in discharging a debt of her own, it would have been good; or even if she had received it immediately after the death of the testator, before the banker was apprised of it, I am inclined to think no Court would have taken it from her."

In this case I have the very distinction thus pointed out by Lord *Loughborough*. Mrs. *Pearce* did pay away the proceeds of the cheque, and, it would seem, amongst the husband's creditors. And I think that when a man gives his wife a cheque it is in substance as complete a gift as if he handed her the cash. It is, however, said that in the report of *Tate* v. *Hilbert* in *Brown's* Chancery Cases an additional circumstance is mentioned in the judgment, and Lord *Loughborough* is made to say (3): "If the note had been paid away for valuable consideration, and the money received at the bankers before notice of the death of the party, or immediately after, it might have availed." If there is any real discrepancy, I think that the report in *Vesey* is probably the more accurate, and that it was intended to be held that an actual dealing for value with a note would complete the gift as a valid *donatio mortis causâ*.

I consider, therefore, that Mrs. *Pearce* has made out a good title to the proceeds of the cheques, and I will answer the first question in the case in the affirmative.

Solicitors: *F. & T. Smith & Sons; Joseph Mote.*

(1) 2 Ves. 111. (2) 2 Ves. 118.
(3) 4 Bro. C. C. 291.

In re WILLIAMS.

V.-C. M.
1877
June 2.

Charitable Legacy—Object partly illegal—Repair of Tombs—Whole Fund given to valid Charity.

A testator gave a fund to trustees upon trust to apply the income in keeping in repair certain tombs, and directed them to accumulate the surplus income from time to time till it amounted to £25 and upwards, and when that took place to pay over in equal shares to the incumbents of two parishes for the benefit of poor persons, such sum as would reduce the accumulations to £20:—

Held, that the invalidity of the trust for the repair of the tombs did not render the whole gift void, but that, the first object having failed, the will must be read as if nothing was applicable to the repair of the tombs, and that the whole fund went to the incumbents.

ADJOURNED SUMMONS.

Statement.

William Williams, by his will, dated the 1st of March, 1873, bequeathed to his executors two sums of £100 each, to be by them invested in manner thereby authorized, and upon trust to apply the income to be derived therefrom in keeping in repair certain tombs therein specified. And the testator directed that if in any year the whole or any part of the income of such respective sums should not be required for such respective purposes for which it was given, the surplus should be invested, and if necessary applied in any future year in which the income of such last-mentioned year might be insufficient for such purposes. But he directed that when and so soon as the value of such accumulations should amount to £25 and upwards his trustees should pay over in equal shares to the incumbents for the time being of the parishes of *Chelmsford* and *Shenfield* such sum of money as would reduce the value of such accumulations to the sum of £20, and that such incumbents should divide the money so paid over to them between and amongst three poor sick or infirm people residing in their respective parishes in equal shares.

The trustees paid the fund representing the £200 into Court under the *Trustee Relief Act.*

The persons entitled to the residue under the will took out a summons for payment of the fund to them, and this was now adjourned into Court.

V.-C. M. 1877 *In re* WILLIAMS. Argument.

Whitehorne, in support of the application :—

The part of the gift relating to the repair of the tombs is unquestionably void, as tending to create a perpetuity: *Rickard* v. *Robson* (1), and from its frame it is impossible to separate the two parts or say that any portion is good. Taking away the trust for the repair of the tombs, the remainder would at least be void for uncertainty: *Fowler* v. *Fowler* (2).

Badnall, for the incumbents :—

This is a case in which the Court might if necessary apportion the gift between the purpose which is void and that which is good, and allow the application of the whole to the good purpose: *Fisk* v. *Attorney-General* (3). When it is possible to ascertain how much of a fund will be required for the void purpose, the valid portion of the gift will not be allowed to fail: *Hunter* v. *Bullock* (4). *Chapman* v. *Brown* (5) is either overruled or can be distinguished from the cases the other way on the grounds stated in *Hunter* v. *Bullock*. It was practically overruled by the *Magistrates of Dundee* v. *Morris* (6). But it is not necessary to resort to the device of separating the two portions of the gift. The testator has given all that is not required for the first object to the second, and nothing being required for the first object on account of its illegality, the whole fund goes to the remaining purpose: *Dawson* v. *Small* (7). The accumulation is merely machinery for the purpose of augmenting the available fund.

Whitehorne, in reply :—

Fisk v. *Attorney-General* and the cases decided the same way were cases of a gift of an entire residue partly to a purpose which failed and the residue to a valid object. Here it is necessary, in order to carry out this gift, that £20 should always be kept in hand for the illegal object. The legal purpose only applies to the residue of the fund remaining unapplied to the illegal object. It is not a legal trust of the whole fund subject to an illegal purpose,

(1) 31 Beav. 244. 8 Jur N S 665
(2) 33 Beav. 616. 10 Jur N S 648
(3) Law Rep. 4 Eq. 521.
(4) Law Rep. 14 Eq. 45.
(5) 6 Ves. 404.
(6) 3 Macq. 134.
(7) Law Rep. 18 Eq. 114.

but the whole fund is given subject to the performance of the illegal object, and therefore fails entirely: *Cramp* v. *Playfoot* (1).

MALINS, V.C.:—

There is evidently a conflict of authority on this question, and if *Fisk* v. *Attorney-General* (2) had not been the latest governing case in point of time I should have reserved judgment in order to compare the different decisions. But that being so, such a course becomes unnecessary. [His Lordship then read the words of the will, and continued:—]

On behalf of the residuary legatees it is contended that, inasmuch as only so much is given for the valid purpose as is not required for the illegal object, the whole gift fails. In support of that contention many cases have been cited, such as *Chapman* v. *Brown* (3), *Fowler* v. *Fowler* (4), and *Cramp* v. *Playfoot* (5). In that case Vice-Chancellor *Wood* held that, as the whole of the fund given might have been employed in building the school, there was no room for an inquiry as to what residue there would be applicable to the good charitable gift. I confess I should not concur in that view, because it seems to me necessarily to follow that, the first trust failing, the second takes effect as to the whole fund. I should have stated this conclusion more fully if Vice-Chancellor *Wood* had not himself, in *Fisk* v. *Attorney-General*, adopted the principle which I am about to apply in the present case.

In this case, if the first gift cannot take effect, there is no reason whatever why the whole fund should not be applied to the second object. If the first gift had taken effect, only a small part of the fund would have been absorbed. It is, therefore, only so much as is required for the illegal purpose which is abstracted. The gift being void, none is required, and consequently the entire fund remains applicable to the valid purpose.

In adopting this view, I think I am relieved from the necessity of overruling those cases which have treated the whole of the gift as void because part of it was illegal, because I consider that they

(1) 4 K. & J. 479.
(2) Law Rep. 4 Eq. 521.
(3) 6 Ves. 404.
(4) 33 Beav. 616.
(5) 4 K. & J. 479.

10 Jm 18648

V.-C. M. 1877 *In re* WILLIAMS. Judgment.

are overruled by *Fisk* v. *Attorney-General* (1). According to those decisions, the gift in that case ought to have been wholly void, but the Vice-Chancellor gave effect to the secondly mentioned object. Mr. *Whitehorne* contends that the decision in *Fisk* v. *Attorney-General* turned on the following passage in the judgment (2): "The gift is not to the executors to do certain things and pay the residue to the rector and churchwardens; the gift is out-and-out to the rector and churchwardens, and then there is a gift of a portion for a purpose which fails." But I do not agree with this view of the decision. I consider that the Vice-Chancellor really intended to overrule *Chapman* v. *Brown* (3). He refers to that case in these terms (4): "In *Chapman* v. *Brown* the trust was 'for the purpose of building or purchasing a chapel,' and 'if any surplus should remain' the same was to go 'towards the support of a minister not to exceed the sum of £20 a year.' The bequest for building the chapel was held to be void, and the bequest of the residue was held to be void also, because it was impossible to ascertain how much would remain after taking out what was required for the chapel." That is *Chapman* v. *Brown* very clearly stated by Lord *Hatherley*. If he had followed *Chapman* v. *Brown* he would have held that, the first object being void, the second would be so too. Therefore, eminent as Sir *William Grant* was, I feel myself bound to come to the conclusion that the decision is one that cannot be followed. I am very glad to find that Vice-Chancellor *Bacon* has also adopted the same view in *Hunter* v. *Bullock* (5) and *Dawson* v. *Small* (6), in the latter of which he says (7): "I think this case is governed by *Fisk* v. *Attorney-General*, and that the decision in that case not only binds me, but guides me to the decision of this case." By which I understand him to mean that it guided his judgment in that case, as it does mine here. That was a case where a testator be queathed to his executors £600 out of his pure personal estate upon trust to invest and apply the income in keeping in repair certain tombs, and directed that any surplus that might remain

(1) Law Rep. 4 Eq. 521.
(2) Ibid. 524.
(3) 6 Ves. 404.
(4) Law Rep. 4 Eq. 526.
(5) Ibid. 14. Eq. 45.
(6) Ibid. 18 Eq. 114.
(7) Law Rep. 18 Eq. 117.

after defraying yearly the expenses as above stated should be given every year by his executors to certain poor pious members of the Methodist Society, and the Vice-Chancellor *Bacon*, following most reasonably the decision of the Vice-Chancellor *Wood* in *Fisk* v. *Attorney-General* (1), decided, as I do now, that the result was just the same as if no tombs existed and the whole of the fund was surplus, and as such applicable to the second purpose.

Solicitors: *Iliffe, Russell, & Iliffe; E. P. Landon.*

(1) Law Rep. 4 Eq. 521.

V.-C. B.
1877
April 19.

TAYLOR *v.* ECKERSLEY.

[1876 T. 65.]

Receiver—Agreement for Bill of Sale—Bankruptcy Act, 1869, *s.* 15 (5)—*Bills of Sale Act* (17 & 18 *Vict. c.* 36), *s.* 7—*Order and Disposition—Apparent Possession.*

In an action to enforce an agreement by *B.*, an innkeeper, to give a bill of sale of his furniture and effects, *A.* obtained the appointment of a receiver, who entered into possession on the 16th of March, 1876, and served the customers. During the night *B.* absconded, and next day (the 17th of March) filed a liquidation petition, under which a receiver was appointed in bankruptcy. The two receivers remained in joint possession :—

Held, that the case did not fall within the provisions of the *Bills of Sale Act*, 1854, and that the possession of *A.'s* receiver had taken the goods out of the order and disposition of *B.* at the time of his bankruptcy; and accordingly that the title of *A.* prevailed over that of *B.'s* trustee in bankruptcy.

Statement.

IN February, 1875, the Plaintiff was applied to by the Defendant, who was then in treaty for a lease of the *Sun Inn*, at *Barrow-in-Furness*, and for the purchase of the fixtures and stock-in-trade, to join him in a promissory note to secure an advance to the Defendant, by Messrs. *Boddington & Co.*, brewers of *Manchester*, of £850, the amount of purchase-money required. The Plaintiff agreed to join in the note, and also to supply the Defendant with wine and spirits, on the faith of a verbal promise by the Defendant to give him forthwith a bill of sale of the furniture, fixtures, stock-in-trade, and effects at the *Sun Inn*, as security for any sum Plaintiff might be called upon to pay under the promissory note, and for the price of the wines and spirits so to be supplied.

On the 30th of June, 1875, the Defendant signed an agreement whereby he undertook and agreed, whenever called upon, to execute a bill of sale in favour of the Plaintiff of all his furniture and effects in the *Sun Inn*. A bill of sale, with an inventory of the furniture, chattels, and effects at the *Sun Inn*, was prepared and engrossed by the Plaintiff's solicitor, but signature was from time to time delayed, and on the 10th of March, 1876, the Defendant absolutely declined to execute it.

On the 13th of March, 1876, the Plaintiff issued a writ in an

action against *Eckersley*, claiming specific performance of the agreement to execute the bill of sale; a charge by way of mortgage on the furniture and effects by virtue of the agreement; and an injunction to restrain the Defendant from parting with any of the furniture and chattels, and a receiver.

On the 16th of March, 1876, upon an *ex parte* application in the action, the Court of Appeal, in addition to an order of Vice-Chancellor *Bacon*, by which *Eckersley* was restrained from parting with the furniture, chattels, and effects mentioned in the schedule to the bill of sale, and it was referred to Chambers to appoint a receiver of the premises, appointed the Plaintiff interim receiver (without giving security) for fourteen days, or until a receiver should have been appointed under the Vice-Chancellor's order; the Plaintiff undertaking not to deal with such goods and chattels except under the direction of the Court, and to be answerable in damages (1).

On the same day, at 5 P.M., the Plaintiff came to the *Sun Inn*, and announced his appointment as interim receiver. He left in possession one *Wade*, as his agent, who attended to customers at the bar, and slept in the house that night. On the same night, or very early next morning, *Eckersley* left the house, and *Wade* remained in possession as agent of the Plaintiff, at first alone, and after the appointment of *Barff*, jointly with him, as mentioned below. On the 27th of March, 1876, *Wade* was formally appointed, and perfected his securities, as the receiver under the Vice-Chancellor's order of the 16th of March.

On the 17th of March *Eckersley* commenced proceedings for liquidation by arrangement, and on the same day one *Barff* was appointed receiver by the County Court of his goods and effects on behalf of his creditors, and the Plaintiff was restrained from taking proceedings in respect thereof. On the same day *Barff*, the bankruptcy receiver, entered upon the premises, and the two receivers continued in joint possession until the 8th of May, 1876.

On the 8th of May, the order of the County Court Judge, appointing a receiver, and restraining the Plaintiff from taking proceedings, was discharged by the Chief Judge.

On the 4th of April, 1876, *Ellis* was appointed trustee of the estate of the Defendant *Eckersley* in liquidation.

(1) 2 Ch. D. 302.

V.-C. B. 1877 TAYLOR v. ECKERSLEY.

On the 11th of May, 1876, the trustee in liquidation was made Defendant to the action, and the question now argued at the hearing was whether, notwithstanding the appointment of the receiver in the action on the 16th of March, and his entry upon the premises before the commencement of the liquidation proceedings, the trustee was entitled either under the *Bills of Sale Act* or the order and disposition clause.

Argument.

Russell Roberts (*Kay*, Q.C., with him), for the Plaintiff:—

The facts disclose a good agreement for value to execute a mortgage, and therefore shew a good equitable title in the Plaintiff to the furniture and effects, subject to redemption. The only title by which that title as equitable mortgagee could be defeated, would be that of the trustee in bankruptcy claiming the property as in the apparent ownership of the debtor at the time of his bankruptcy. But at the time of his bankruptcy (viz., the 17th of March, on which day the liquidation petition was presented) the furniture and effects were certainly not in the apparent ownership of *Eckersley*, but in that of the Plaintiff and his agents, both in fact and by the order of the Court. Even if the possession was not absolute, there had been such a demand as to negative the suggestion that the goods were at the time of the bankruptcy in the order and disposition of the bankrupt with the consent of the Plaintiff, the true owner: *Ex parte Harris* (1). It makes no difference that no bill of sale had been executed and registered before the bankruptcy. Possession, or an unequivocal demand for possession, as in *Ex parte Harris*, is all that is required to defeat the title of the trustee in bankruptcy, and without this even a registered bill of sale would have been ineffectual: *Ex parte Harding* (2). The Court is therefore at liberty to deal with the property exactly as it would have done if no bankruptcy had supervened, in which case the Plaintiff's title would have been good against all the world.

Sir *H. Jackson*, Q.C., and *Grosvenor Woods*, for the Defendant *Ellis*, the trustee in bankruptcy:—

As against the trustee in bankruptcy the Plaintiff's case must fail. The goods up to the time of bankruptcy were never out of

(1) Law Rep. 8 Ch. 48. (2) Law Rep. 15 Eq. 223.

the legal possession or apparent ownership of *Eckersley*, who did not leave the *Sun Inn* until the morning of the 17th of March. Although by the *Bankruptcy Act*, 1869, s. 15, par. 5, the consent of the true owner is a necessary condition to the vesting in the bankrupt's trustee of goods in the apparent possession, order, or disposition of the bankrupt as reputed owner, a different rule prevails under the *Bills of Sale Act* (17 & 18 Vict. c. 36), by which this case must be governed. If, as here, the bill is not registered, and the goods are in the apparent possession of the bankrupt at the commencement of the bankruptcy, they will pass to the trustee, notwithstanding the owner may have done some formal act shewing his dissent to such possession. In this case the possession of *Wade* as receiver was merely formal for the purpose of preventing any removal of the goods and protecting the property. After his entry on the premises on the 16th of March the business went on exactly in the same way as usual, and this formal act of taking possession did not put an end to the real or apparent possession of *Eckersley* within the *Bills of Sale Act* (17 & 18 Vict. c. 36), s. 7; and accordingly, as against the Plaintiff, who claims under an agreement to execute him a bill of sale, which gave him no legal interest in the chattels, the title of the trustee in bankruptcy prevails: *Ex parte Jay* (1); *Ex parte Hooman* (2); *Ex parte Homan* (3).

[*Russell Roberts* called attention to his Lordship's remarks in *Ex parte Harding* (4), as to the ground of his decision in *Ex parte Homan.*]

Argument.

BACON, V.C.:—

Judgment.

The distinction between "apparent ownership," mentioned in the *Bills of Sale Act*, and "order and disposition" under the *Bankruptcy Act*, is perfectly well understood. *Ex parte Jay* and *Ex parte Hooman*, which have been referred to, are cases under the *Bills of Sale Act*, where the decision turned upon the fact of the apparent possession. The chattels being in the order and disposition of the debtor liable to the bankrupt laws with the consent of the true owner is a totally different thing. This case is wholly

(1) Law Rep. 9 Ch. 697.
(2) Ibid. 10 Eq. 63, 69.
(3) Law Rep. 12 Eq. 593.
(4) Ibid. 15 Eq. p. 228.

V.-C. B. 1877 TAYLOR v. ECKERSLEY. Judgment.

free from the operation of the *Bills of Sale Act.* First of all, there never was a bill of sale, which one would suppose was quite enough to dispose of that point. The question is not upon a bill of sale. There is a contract to make a bill of sale, and in respect of that contract a suit is instituted. The bill is filed to give effect to that contract, and upon the filing of the bill the Court makes an order appointing a receiver, who at once takes the things to which that order applies wholly out of the possession of the Defendant, apparent or otherwise. And there could be no implication of consent on the part of the owner, because the very terms of the application and the order upon it exclude any such consideration. What, then, is the effect of an order appointing a receiver of a chattel? To what end can it be said that the legal right to that chattel remains in the original owner of it? According to the settled principles of contract enforceable in equity, an agreement to do a thing is to be construed as if it were done with all the consequences which would attach to it if it were done at the time at which it was contracted for. This is a contract to make an assignment—because a bill of sale is an assignment—which would part with the legal possession altogether. The Court orders some other person, neither the Plaintiff nor the Defendant—the Plaintiff in this instance because of the interim order, but not in his character of Plaintiff—to take possession. There is an end to any question about legal right. The legal right, no matter what it is, must be subservient at all times to the equitable decision which will ultimately be pronounced. In the meantime the receiver takes possession. It is said that he does not take possession in a notorious manner. He does it in the same way as a sheriff's officer takes possession whenever he has to execute a writ of *fieri facias*, or whatever the form of judgment may be. Here, according to the evidence, he took actual positive possession. He turned out the late owner, or, at all events, he induced the man to turn himself out, for late in the day of the 16th of March that man disappeared. Whether he remained in the house during a part of the night or not is not clearly in evidence; but when the man whose possession had never been questioned or disturbed got up in the morning he could not find the owner. He was not in the house, and, as the affidavit says, never set foot there after that. Up to

that time he was not bankrupt. No doubt the order and disposition clause gives a trustee in bankruptcy rights which the bankrupt himself could not have had. Suppose he had never become bankrupt, could there be any question then? The Plaintiff's right not being in dispute, or capable of being disputed, and a receiver being appointed, the bankrupt himself never could have said anything against the Plaintiff's claim. But the assignees in bankruptcy might, and that is one of the few instances in which assignees in bankruptcy have rights which the bankrupt himself could not assert. And "order and disposition" is perhaps the most remarkable of those instances. In this case, in my opinion, it is very clearly proved, and not disputed, that there is a valid contract for an assignment of the legal interest in those chattels; that that agreement had been broken, and then a bill is filed for the purpose of enforcing that agreement. Before a decree could be made the Court takes care that no further mischief shall happen by the Defendant forbearing or refusing to do that which by the decree he may be declared bound to do; takes the property out of his possession, and puts it into the hands of a stakeholder. The possession was taken. There is nothing to stand in the way of that possession except the order and disposition clause in the *Bankruptcy Act*. That could have no avail against the equitable right of this Plaintiff to have the agreement specifically performed. The *Bills of Sale Act* is out of the question altogether. Although the reasoning upon it may be useful to elucidate the question, it can have no application to the facts of this case. Therefore, the Plaintiff having proved the agreement, having proved the actual possession before any act of bankruptcy was committed, I am of opinion that he is entitled to have the agreement strictly performed, and to have his title to the chattels of which he has taken possession declared. The Plaintiff will have costs, not against the trustee personally, but only out of the estate.

Solicitors: *Chester & Co.*, agents for *R. B. D. Bradshaw, Barrow-in-Furness; Milne, Riddle, & Mellor*, agents for *Boddington & Ball, Manchester.*

V.-C. H.

1877

May 4.

In re NEWBERRY'S TRUSTS.

Appointment of Real Estate subject to a Term—Direction to raise Money—Failure of Objects of Trusts—Intestacy of Appointee—Charge, Real or Personal Estate, in Heir.

Real estate was appointed to *A.*, subject to a term of years in trustees, who were directed to raise a sum of money out of it and hold it on trusts for certain tenants for life and their children. *A.* died intestate, leaving an only son. The money was raised and applied for the benefit of the tenants for life, who survived *A.* and died without issue:—

Held, that the capital of the fund went to the personal representative of *A.*

Re Cooper's Trusts (1) explained.

Statement.

THIS was a further hearing of a petition.

P. Newberry, a widow, who died in 1833, by her will, dated in April, 1829, in execution of a power of appointment contained in a marriage settlement dated in 1809, appointed real estate to her son *J. W. Newberry*, subject to a term of years, which was vested in trustees, who were directed to raise the sum of £2700, and to stand possessed of £1000 part thereof upon trust to pay the income to her daughter *R. Arnett* for her life, and after her death upon trust to pay such income to the husband of *R. Arnett* for his life, if she should so appoint, and from and after her decease, but subject to the power of appointment, to stand possessed of the £1000 in trust for their children. The sum of £2700 was raised by the trustees. *R. Arnett* died in 1868 without having had any children, and her husband, in whose favour his wife had exercised her power of appointment, died in 1869. The son, *J. W. Newberry*, died in 1865 intestate, having had only one son, and this was a petition by him for the payment out of a fund representing the sum of £1000, which the trustees had paid into Court, and the accrued dividends.

Vice-Chancellor *Hall*, on the original hearing of the petition in July, 1876, decided that the charge of £2700, so far as it failed, sank for the benefit of the appointee of the residuary real estate of Mrs. *Newberry*, and the only question for decision now was

(1) 4 D. M. & G. 757.

whether or not the fund retained its quality of personalty, or had become reconverted.

Argument.

Dickinson, Q.C., and *Macnaghten*, for the heir-at-law of *J. W. Newberry*, submitted that the fund belonged to him, and referred to the case of *In re Cooper's Trusts* (1).

H. A. Giffard, for the widow of *J. W. Newberry*, contended that as *J. W. Newberry* did not elect to take the fund as realty, it must retain its quality of personalty.

R. W. E. Forster, for other parties.

F. J. Wood, for the trustees; and

Dauney for parties who, under the limitations of the settlement of 1809, would have, in default of appointment, been entitled, submitted that the £1000 went, not to the heir-at-law, but to them.

Judgment.

HALL, V.C.:—

I am of opinion that the case of *Re Cooper's Trusts*, which was decided in 1853, and upon which reliance was placed by the counsel for the heir-at-law, does not really, either as regards the judgment of Vice-Chancellor Sir *W. Page Wood*, or that of the Lords Justices, or both together, assist the Court in coming to a decision in this case. In that case the testator devised to trustees certain lands upon trust to raise, within one year after his death, the sum of £2000, and to invest the same; and in trust to permit his son *Philip* to enjoy the lands (after raising the money) for his life, and after his decease in trust for *Philip's* children, but in case he should leave no issue the testator devised the lands unto his two sons *Simeon* and *Thomas*, and as to £1000, part of the £2000, he directed it to be held in trust to pay the interest to his daughter *Mary* for her separate use, and after her decease to pay the same to her children; and as to the other moiety, it was to be held in trust to pay the interest to his daughter *Elizabeth* for life, and after her decease to apply and divide the interest and principal respectively for the benefit of her children.

(1) 4 D. M. & G. 757.

V.-C. H. 1877 *In re* NEWBERRY'S TRUSTS. Judgment.

The residue of his estate, real and personal, he gave to his sons *Simeon* and *Thomas*. The £2000 was raised. *Elizabeth* died without having had a child. *Mary* died leaving four sons, and they received a moiety of the money. The testator's sons had all died without leaving children. Disputes arose as to the persons to whom the £1000 in which *Elizabeth* had a life interest belonged, and the question before both Courts was whether, as it did not vest in the particular persons intended (the children of *Elizabeth*) under the dispositions in the will, it was a part of the lands which passed by the devise of the testator, and out of which the money was raised. That was the only question, and Lord Justice *Knight Bruce*, in testing the title of the persons who claimed the fund as personalty, and of the persons who claimed it as part of the land included in the devise, said in effect: Suppose the money to have been raised by means of a sale, and *Philip*, the tenant for life of the land devised, to be alive, and the two remaindermen, *Simeon* and *Thomas*, to be alive, and *Elizabeth* and her children, who had and would have had, if any, interests in the £1000, out of the way, *Philip* and those interested in the real estate would have a right to say the money must be laid out in lands again, and have given to it the actual character as well as the assumed character of realty, and, that being so, it appeared to his Lordship that the money ought to be treated as part of the devised lands.

But in this case, after it is declared to be part of the devise itself, an entirely different question arises as to the character in which the person entitled to the money takes it: does he take it as real estate which shall descend to his heir-at-law, and then, upon the death of that heir-at-law, descend to another heir-at-law, and so on, or does he take it (although his title to it has accrued as if it were real estate) in its actual character of money. The general principle I consider to be that, as between representatives of real and personal estates, there is no equity to have the money changed into a character different from that which it has, merely for the purpose of affecting the ownership, and devolution of it; and as regards this sum, although it comes back again, having been raised, and properly raised, there is now no purpose requiring that it be turned into land again, and no equity in any-

body to have it laid out in land again. I hold, therefore, that it must be taken as it is found; although it came to the appointee as part of the appointed estate, it came to him as money, and now forms part of his estate as money, and belongs to his legal personal representative.

V.-C. H. 1877 *In re* NEWBERRY'S TRUSTS.

Solicitors: *Cunliffe & Beaumont*; *Surr & Gribble*; *Fraser*.

In re BRITISH IMPERIAL CORPORATION.

V.-C. H. 1877 *May* 15.

Summons in Liquidation—Companies Act, 1862, *ss.* 100, 165—*Service out of the Jurisdiction—Rules of Court*, 1875, *Order* XI., *rr.* 1, 4.

Leave was given to serve out of the jurisdiction a summons taken out by the liquidator of a company under the *Companies Act*, 1862, ss. 100, 165, and the parties were allowed a time for appearance as upon service of a bill or suit.

Statement.

THIS was an application *ex parte* on behalf of the liquidator of the *British Imperial Corporation, Limited*, for leave to serve a summons upon two officials of the company resident in *Scotland*. The summonses were taken out under the *Companies Act*, 1862, ss. 100, 165.

Argument.

Millar, for the liquidator, stated that leave to serve petitions out of the jurisdiction of the Court had been given in the cases of *Shurmer* v. *Hodge* (before Vice-Chancellor *Kindersley*, July 24, 1866) and in *In re Haney's Trusts* (1), and that there was no order upon the subject, except as to the service of a bill or a writ of summons under Rules of Court, 1875, Order XI., rules 1, 4. Leave was given in *In re Bonelli's Electric Telegraph Company* (2), but it was there stated that the case of *In re Maugham* (3) had created some difficulty.

Judgment.

HALL, V.C., gave leave to serve the summons at *Glasgow* or elsewhere in *Scotland*—the parties to have time for appearance limited as upon appearance on service of a bill or writ.

Solicitors: *Pritchard, Englefield, & Co.*

(1) Law Rep. 10 Ch. 275. (2) Law Rep. 18 Eq. 655.
(3) 22 W. R. 748.

FRY, J.

1877

May 11, 12, 14.

ATTORNEY-GENERAL *v.* TOMLINE.

[1874 A. 124.]

Copyholds—Encroachment on Waste by Copyhold Tenant—Nature of Title acquired—Accretion to original Holding—Statute of Limitations—Mines and Minerals—Coprolites—Rights of Lord—Digging without Consent of Tenant—Measure of Damage—Custom to grant Waste as Copyhold—Evidence—Injunction—Trespass—Permanent Injury—Action by Reversioner—Costs—Wrongdoer.

An encroachment made by a copyhold tenant upon the waste of the manor becomes, at any rate in a manor in which there is a custom that the lord may grant portions of the waste as copyhold, an accretion to the original holding, and the tenant acquires by adverse possession, under the *Statute of Limitations*, only a copyhold title to the encroached land.

Coprolites beneath the surface of a copyhold tenement are minerals, and the property in them is in the lord, though, in the absence of a special custom, he cannot dig for them without the permission of the tenant.

The lord of a manor, in which there was no custom authorizing him so to do, entered without permission on the land of a copyhold tenant, which was in the occupation of a tenant, and dug for and carried away coprolites. A large trench was dug, which, at the time when the copyhold tenant commenced a suit against the lord to restrain the trespass, was not filled up, though it was filled up and the surface restored before the suit came to a hearing. The digging was continued after the filing of the bill, and until the coprolites were exhausted:—

Held, that, under the circumstances, the copyholder, though only a reversioner, could maintain a suit against the lord for an injunction and damages:

Held, also, that the proper measure of damage was the gross amount produced by the sale of the coprolites, less the expenses of the working, and such a sum by way of profit as would have induced a stranger to undertake the working.

As evidence of an alleged custom authorizing the lord of a manor, with the consent of the homage, to grant portions of the waste as copyhold, two admittances in pursuance of such grants, made respectively in 1849 and 1857, were produced:—

Held, that, in the absence of any contradictory evidence, the custom was sufficiently proved.

A wrongdoer cannot be heard to complain that in proceedings hurriedly taken to stop the wrong the Plaintiff has not accurately stated his title, and in such a case the Defendant will not be relieved from the payment of the extra costs occasioned by the Plaintiff's mistake as to his title.

Statement.

THIS was an information by the Attorney-General on behalf of the Crown, and a bill by the Secretary of State for War and His

S C on appeal 7 Ch D 388

S C as to amount of damages 11 Ch D 150

Royal Highness the Duke of *Connaught* as Plaintiffs, against Colonel *George Tomline*, the lord of the manor of *Walton-cum-Trimley*, in *Suffolk*, and it sought an injunction to restrain the Defendant from digging in or continuing to trespass upon a piece of land in the possession of the War Department, described as the *Q Tower* land, or removing coprolites or other material therefrom. The information and bill prayed also an account of the profits made by the Defendant from the sale of the coprolites taken by him, and that he might be decreed to pay what upon taking such account should be found due, and for an account and payment of the amount of damage sustained by reason of the Defendant's trespass beyond the amount of the profits made by him.

The piece of land in question was situated within the manor of *Walton-cum-Trimley*, in *Suffolk*, and formed one inclosure, in shape nearly a square. It was occupied in part by a martello tower, known as the *Q Tower*, and the glacis attached thereto. The land may be considered, for convenience of reference, as divided into two portions, distinguished as the north-west portion and the south-east portion, the division between them being an imaginary curved line drawn from the north-east corner of the inclosure to the south-west corner, the curve being towards the south-east, so that the north-west portion was considerably larger than the south-east. This imaginary curved line was the site of an old road which had been obliterated many years before the information was filed. The *Q Tower* and the greater part of its glacis were situate within the north-west portion.

The north-west portion was copyhold of the manor, and it was on the 30th of June, 1809, in consideration of £670 16*s.* 3*d.* paid to *Charles Collett* by the principal officers of His then Majesty's Ordnance for and on behalf of His Majesty, surrendered by *Charles Collett* and *Charlotte*, his wife, to the use of *R. H. Crew*, secretary to the principal officers of His Majesty's Ordnance, and his heirs, in trust for the King, his heirs and successors for ever. The piece of land comprised in the surrender was therein described by its abuttals and as land "on which a martello tower had been or was intended to be erected for the defence of that part of the coast." There was nothing to shew that the land was

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then inclosed by any fence. On the 17th of July, 1810, *R. H. Crew* was admitted to the land comprised in this surrender, to hold the same to him and his heirs in trust for the King, his heirs and successors for ever, at the will of the lord, according to the custom of the manor. This piece of land became, by virtue of successive surrenders and admissions, and ultimately by an admission dated July, 1874, vested in the Duke of *Connaught* in trust for Her Majesty. The rights of the Board of Ordnance were by the Act 18 & 19 Vict. c. 117 vested in the Secretary of State for War. The south-east portion of the land in question, or at least the part of it in which the coprolite pit was opened, was formerly part of the waste of the manor. There was evidence that the north-west and south-east portions formed in the year 1819 one inclosure with a fence surrounding the whole, and that the whole was then in the possession or occupation of the Board of Ordnance, and that they and their successor, the Secretary of State for War, and their tenants, remained in undisturbed possession of it until interfered with by the Defendant in the year 1874. No title, however, except a possessory title, was shewn by the Secretary of State for War to the south-east portion of the inclosure, and there was no direct evidence of the date prior to 1819 when the inclosure of the south-east portion was made. It appeared, however, from the rolls of the manor, that at a Court holden on the 3rd of November, 1808, the then lord granted a license to *Alexander Mair*, the then Lieutenant-Governor of *Landguard Fort* (a fort situate near the *Q Tower*), to inclose a certain piece of land containing five acres, parcel of the waste of the manor and of common of the lord, To hold to *Mair* for his life, if he should so long continue Lieutenant-Governor of *Landguard Fort*, but not otherwise, at an annual rent of 2*s.* 6*d.* Mr. *A. A. Watts*, who was the steward of the manor in 1876, made an affidavit on behalf of the Defendant, in which he said that he was well acquainted with the land described in the license, and that it was the same as that distinguished as the south-east portion of the *Q Tower* inclosure, but did not state his means of identifying the land. *Watts* was not cross-examined, and his evidence was uncontradicted.

Alexander Mair ceased to be Lieutenant-Governor of *Landguard Fort* on the 19th of June, 1811. In 1849, by the consent of the

Board of Ordnance and the then lord of the manor, a new road was made along the south side of the inclosure, a portion of the inclosure being appropriated as its site, and the fence on the south side of the inclosure being set back for the purpose. The road was made at the expense of the person who then occupied the *Q Tower* land as tenant to the War Department, and who occupied other adjoining land. From 1860 down to the date of the filing of the information Mr. *J. C. Cobbold* occupied the whole of the *Q Tower* land for agricultural purposes as tenant of the War Department, whether at will or otherwise did not appear.

In November, 1874, the Defendant, without the consent of the War Department, and without any previous notice to them, removed a portion of the fence on the east side of the *Q Tower* land, and with his workmen entered thereon and dug a large trench in the south-east portion, and commenced taking out coprolites, and continued to do so up to the 22nd of February, 1875. The digging extended over more than 3000 square yards of surface. After the coprolites had been removed the Defendant filled up the trench and made good the surface.

The information was filed on the 12th of December, 1874, and it stated that the whole of the *Q Tower* land was copyhold of the manor, to which the Duke of *Connaught* was admitted in July, 1874. The information was amended on the 8th of February, 1875, and it then contained, in paragraph 5, this allegation: "That portion of the *Q Tower* land which lies to the south-east of the old road is believed to be of freehold tenure, and is hereinafter referred to as the freehold portion of the *Q Tower* land, but whether freehold or copyhold the same has been vested in Her Majesty or in the principal officers of Her Majesty's Ordnance and the principal Secretary of State for the War Department successively on behalf of Her Majesty from a remote period down to the present time."

There was no custom in the manor authorizing the lord to enter upon the land of a copyhold tenant to dig for minerals without his consent. It was alleged by the Defendant that there was a custom authorizing the lord, with the consent of the homage, to grant portions of the waste as copyhold. To prove the existence of this custom, two admittances were produced, dated in April,

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1849, and November, 1857, and made in pursuance of grants by the lord of portions of the waste, with the consent of the homage. There was also evidence that the coprolites were saleable at 45*s.* per ton.

Sir *J. Holker*, A.G., *Hemming*, Q.C., and *Rigby*, for the informant and Plaintiffs:—

When the original information was filed it was supposed that all the *Q Tower* land was copyhold. It has since been discovered that the south-east portion was not included in the copyhold admission, and as to this portion we say that the Crown has acquired a freehold title by adverse possession for upwards of fifty years. But the Defendant being a mere trespasser, it is enough for the Crown to shew actual possession of the land, even if the possession was originally taken wrongfully. If the Crown encroached on the waste, the encroachment cannot change the nature of the tenure and convert what was freehold into copyhold. We are entitled to an injunction, and an inquiry as to damages.

Cookson, Q.C., and *Phear*, for the Defendant:—

The real object is to obtain damages for the digging of the coprolites, and therefore the material question is, who is the owner of the coprolites? That depends on whether the Crown has a freehold or only a copyhold title to the south-east portion of the land. In the original information the informant and Plaintiffs said it was copyhold; in the amended information they only say it is believed to be freehold, and as a matter of pleading we are entitled to take it to be copyhold. But, independently of that, the presumption of law from the facts is that it is only copyhold. The evidence of *Watts*, which is uncontradicted, shews that the south-east portion of the *Q Tower* land is the same as that which was comprised in the license to *Mair* in 1808. The land was then waste of the manor, and, the license to inclose being given to *Mair*, an officer of the Ordnance, the inference is that it was given to him as a trustee for the Crown. At any rate, the probability is that the Crown availed itself of his possession, and thus acquired the land by encroachment at the expiration of his license, *i.e.*, after the surrender of the north-west portion as

copyhold. Admitting, then, that the Crown has been in undisturbed possession of the south-east portion for more than fifty years, still the presumption of law is that it has acquired only a copyhold title, and that being so, the coprolites are minerals, and the property in them is in the Defendant as lord. He may have had no right to dig for them without the permission of the tenant, but, having got what is his own property, it cannot be taken away from him. The Crown, being only a reversioner, is not entitled to an injunction, there being no injury to the reversion.

[FRY, J., referred to *Stanford* v. *Hurlstone* (1).]

If the south-east portion of the land is copyhold, the Defendant, as lord, has the property in the coprolites, which are minerals. The lord is entitled to the minerals under a copyhold tenement, though when they have been taken away the space which they had occupied belongs to the tenant: *Eardley* v. *Earl Granville* (2). *Hall* v. *Byron* (3) also shews what are the rights of the lord; and *Hext* v. *Gill* (4) is a clear authority that coprolites are minerals which belong to the lord.

[FRY, J., referred to *Watkins* on Copyholds (5), and *Scriven* on Copyholds (6), as laying it down that the lord is entitled to the mines (as distinguished from the minerals) under a copyhold tenement.]

It has been laid down in many cases, and is well settled, that if a lessee for lives or years encroaches on waste, whether belonging to his lessor or to a third person, and thus acquires a title by adverse possession, the encroachment becomes an accretion to his original holding and enures for the benefit of the lessor: *Bryan* v. *Winwood* (7); *Kingsmill* v. *Millard* (8); *Andrews* v. *Hailes* (9); *Earl of Lisburne* v. *Davies* (10); *Whitmore* v. *Humphries* (11). This is a legal presumption. There is no authority that it extends to the case of an encroachment made by a copyhold tenant, but upon principle it must. A copyholder is nothing more than a

(1) Law Rep. 9 Ch. 116.
(2) 3 Ch. D. 826.
(3) 4 Ch. D. 667, 675.
(4) Law Rep. 7 Ch. 699.
(5) 4th Ed. vol. i. p. 404.
(6) 5th Ed. p. 301.
(7) 1 Taunt. 208.
(8) 11 Ex. 313.
(9) 2 E. & B. 349.
(10) Law Rep. 1 C. P. 259.
(11) Law Rep. 7 C. P. 1.

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tenant at will who by immemorial custom has acquired an estate: *Scriven* on Copyholds (1). The principle of the presumption is that a person who has only a limited interest cannot, as against the person from whom he derives title, acquire by adverse possession a larger interest than that which he had in the original holding by virtue of which he made the encroachment. This principle applies as much to a copyholder as to a lessee. If it be said that a copyhold tenement cannot be legally created now, the answer is that there is evidence of a custom authorizing the lord to grant parts of the waste as copyhold. Such a custom is valid: *Scriven* on Copyholds (2). We only seek to place the Crown's trustee by construction of law in a position in which he could have been placed by a grant from the lord. The Court will, if necessary, presume such a grant. There is no evidence to rebut the legal presumption; no acts are shewn on the part of the Crown inconsistent with its having acquired only a copyhold title. The occupation of the north-west portion of the land was for military purposes; the south-east portion has been occupied in the same way. On the whole the damages are merely nominal; no injury has been done to the reversion: *Mumford* v. *Oxford, Worcester, and Wolverhampton Railway Company* (3); *Mott* v. *Shoolbred* (4).

And, as the case made by the original information has been entirely altered in the amended information, the Plaintiffs ought, at any rate, to pay the costs of the evidence which the Defendant filed to meet the original case.

Hemming, in reply:—

The Crown is not, in this case, in the position of an ordinary reversioner; its occupation is for military purposes, and at any moment the land may be required for the defence of the country. The existence of a pit, such as that which was dug by the Defendant, would interfere with this use of the land for defence, and therefore the Crown had an immediate right of action. It is like the case of an obstruction to light, where a reversioner can sue in order to protect his right: *Mott* v. *Shoolbred* was a totally different case.

(1) 5th Ed. p. 33.
(2) 5th Ed. p. 14.
(3) 1 H. & N. 34.
(4) Law Rep. 20 Eq. 22.

[FRY, J. :—My difficulty is that the existing copyhold tenant is not the person who wants to use the land for military purposes.]

That difficulty is removed by 5 & 6 Vict. c. 94, s. 8, which gives the beneficial title and enjoyment, as well as the legal estate, in copyholds which are held for the purposes of the defence of the country, to the principal officers of the Ordnance (whose rights are now vested in the Secretary of State for War), and provides that the person admitted as copyhold tenant is to be admitted only for the purpose of ascertaining and preserving to the lord of the manor the right of escheat and all other rights, and for the purpose of performing services and of determining when heriots, fines, and dues shall become due and payable. *Cobbold* is nothing but a tenant at will, or, at any rate, a tenant subject to the user of the land by the Crown for defence. The injury caused by the digging of the pit was one of a permanent character. The digging was going on when the original information was filed, and was continued until the 22nd of February, 1875, if not later.

Then as to the effect of the encroachment, if it was an encroachment. To sustain his argument the Defendant must shew that the encroachment was made after the date of the surrender of the north-west portion of the land. That is not the proper conclusion from the evidence. It is more probable that the Crown had possession of the south-east portion before that date, or, at any rate, that possession was taken at the same time. The evidence of *Watts* is of no weight. He does not shew any means of knowledge; it amounts to nothing but an assertion of his opinion as to a matter about which he can really know nothing. The fact that the Crown is in possession affords a *primâ facie* presumption that it is the owner in fee simple.

The alleged custom to grant the waste as copyhold is not sufficiently proved. But, assuming that it is, it is a custom to grant with the consent of the homage; and no such grant could have been made except at a Court. It is impossible, therefore, to presume a lost grant when the grant must have appeared on the Court Rolls, and is not, in fact, to be found there. Then, if this difficulty is not fatal, and if it is assumed that the encroachment was made after the surrender of the north-west portion in 1810, still the cases as to encroachments by a lessee do not

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apply as between the lord of a manor and his copyhold tenant. They depend upon the peculiar relation of landlord and tenant. There is no authority for extending them to a copyhold tenant. They are founded on a sort of estoppel against the tenant. The question was whether, at the expiration of his lease, he was not bound to give up to the landlord the whole of that which he had been apparently occupying under his lease. *Bryan* v. *Winwood* (1), the first case of the kind, was before the statute 3 & 4 Will. 4, c. 27, which by sect. 34 not only extinguishes the right of action, but divests the estate. Once shew that we are in possession, and no question of this kind can now arise. The object of the statute was to relieve the Court from the necessity of inquiring into such matters.

[FRY, J.:—The judgment of *Willes*, J., in *Whitmore* v. *Humphries* (2) is inconsistent with that argument.]

The Defendant must also shew that the encroachment was made in respect of the original holding. If a lessee acquired an encroachment by a wholly independent title, it would not become annexed to his holding. This is clear from *Earl of Lisburne* v. *Davies*. In the present case, if the Crown made the encroachment after 1810, the inference would be that it acquired it through *Mair*, and not by virtue of the copyhold tenement.

[FRY, J.:—In *Earl of Lisburne* v. *Davies* (3) the encroachment was originally made by a stranger. No wrongful title commenced till the expiration of *Mair's* license.]

It would be a case of holding over.

[FRY, J.:—Then you would be mere tenants at will, and could have no right to the coprolites.]

But the land so held could not become annexed to the copyhold tenement. As we paid no rent the statute began to run at the end of a year. The connection of the encroachment with the original holding is absolutely necessary for the Defendant's argument.

In *Bryan* v. *Winwood* and other cases the landlord happened to be also the lord of the manor, but that had nothing to with

(1) 1 Taunt. 208.
(2) Law Rep. 7 C. P. 8.
(3) Law Rep. 1 C. P. 259.

the decisions. The *Statute of Limitations* was got rid of by denying the lessee the right of proving the facts; it was a sort of personal estoppel against him. But that was not the original foundation of the doctrine, because it applies equally where the encroached land was that of a third party. The only principle on which the doctrine could have been founded seems to be that against which Lord *Campbell,* in *Andrews* v. *Hailes* (1), protested, viz., that the tenant must be taken to have stolen the land for the benefit of his landlord. The same principle must apply in both cases.

[FRY, J.:—I am not sure of that. *Doe* v. *Tidbury* (2) seems to shew that the principle is this: that the Court will presume, if it can, a legal origin of the encroachment. Must I not, by parity of reasoning, in the present case presume a grant, it being proved that there is a custom to grant the waste as copyhold?]

The statute of *Quia Emptores* can only be got rid of by following the custom strictly. It must be proved that this was done, it cannot be presumed. Why should it be presumed that the lord granted the land as copyhold rather than as freehold? The consent of the homage cannot be presumed. The original copyhold tenement has always been treated on the rolls as the only copyhold held by us; there has never been any service exacted in respect of the south-east portion. There cannot be a presumption in contradiction of the rolls.

[FRY, J:—May I not presume anything as against a person who must admit either that he did a wrong, or that he did that which was lawful, provided that it was done in a particular way?]

That which was lawful could have been done in two ways, and one of these ways is more rational than the other. The rational presumption is that the lord allowed us to take the south-east portion, and that the formality of a freehold grant was omitted. The statute supplies that omission, and gives us a freehold title. In the cases relied upon the relation of landlord and tenant was used to limit the estate acquired by the tenant; that principle does not extend to changing the nature of the tenure from freehold to copyhold.

(1) 2 E. & B. 349. (2) 14 C. B. 304.

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If, however, the encroached land has become copyhold, still the Defendant is not entitled to the coprolites. They are not minerals. The observations of Lord Justice *Mellish* in *Hext* v. *Gill* (1) are mere *dicta;* they were not necessary to the decision. The question there was what was the meaning of the word "minerals" in a grant. There is no other authority to the same effect.

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[*Cookson*, Q.C., referred to *Bell* v. *Wilson* (2).]

But even if coprolites are minerals, and the Defendant, as lord, has the property in them, there is no custom authorizing him to dig for them without the consent of the tenant. Therefore we are entitled to the whole, or, at any rate, the greater part of the proceeds of the sale by way of damages for the forcible entry on the land: *Goodson* v. *Richardson* (3). Of course a proper allowance must be made for working expenses. We ought to have the royalty which we should have exacted for a license to dig. The Defendant ought to be allowed to retain nothing but a bare return beyond the expense of working.

[FRY, J.:—There are three elements of profits according to the political economists—interest, assurance, and wages of superintendence; why must not all of these be deducted?]

They should be; but in the matter of digging coprolites the first two are inappreciable.

Phear, in reply, as to the measure of damage:—

Goodson v. *Richardson* is not an authority on that point. Damages were referred to there only as an element in determining whether an injunction should be granted. If the Plaintiffs are right the Defendant would get nothing at all for working the coprolites. He is entitled to a fair profit.

Judgment.

FRY, J.:—

This case has been very fully and very elaborately argued. The first question which arises is with regard to the injunction. The second question is with regard to the measure of damages,

(1) Law Rep. 7 Ch. 699. (2) Law Rep. 1 Ch. 303.
(3) Law Rep. 9 Ch. 221.

supposing damages are to be given at all. [His Lordship stated the facts as to the title, and continued:—]

It is therefore clear that in 1874, when Colonel *Tomline* entered, the Crown was in actual possession of the *locus in quo*, and that the entry by Colonel *Tomline* was made in a very high-handed manner, and without, as I have already said, any previous notification. Well, upon that state of circumstances the injunction would, in my opinion, follow as a matter of course, but for one point which was raised by Mr. *Cookson* for the Defendant. He says that the Crown, or the trustees of the Crown, are only in possession of the reversion, and that this is not a case in which the Court will grant relief by way of injunction to a reversioner.

Now, what are the facts? At the time of the filing of the original information, and at the time of the filing of the amended information, Colonel *Tomline* was excavating a large space on this inclosed ground. The excavation, and spoilbanks consequent upon it, are proved to have extended over 3368 square yards, and, for aught that appeared at that time, or that appears now, there was then no intention upon the part of Colonel *Tomline* ever to fill up the excavation which he had so made. It is quite true that he has now filled it up, partly, no doubt, from the pressure of these proceedings, but, so far as I can gather, there was no intention at that time to fill it up. Such an excavation is, in my opinion, in its very nature, of a permanent description and character, and if it remained it would be an injury to the reversioner. The fact that it did not remain is not material; it was an injury to the *locus in quo*, which, in my opinion, gave the reversioner a right of action.

Therefore I come to the conclusion that the Crown is entitled to a perpetual injunction against Colonel *Tomline* to restrain him from committing trespass on this piece of land. The exact terms of the injunction I will mention presently. Having come to that conclusion, it follows inevitably that the general costs of the action must be paid by Colonel *Tomline*.

The next question which arises is as to the right of Colonel *Tomline* to the coprolites, and the measure of damages. It is clear from what I have said that the Crown is entitled to some damages. Now three measures of damages have been suggested. First, that the Crown is entitled to the entire value of the coprolites. Secondly,

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that the Crown is entitled, at any rate, to the net returns of the coprolites, less such a sum as would have induced an ordinary person to undertake the enterprise of digging for them. Thirdly, it has been suggested by the Defendant that merely nominal damages should be awarded.

Now, in order to determine the question so raised, several points of fact and law have to be considered. The first question is this: Is Colonel *Tomline*, as lord of the manor, entitled to these coprolites; is the property of the coprolites in him, although the possession of the land is in the Crown? In saying that, I am, of course, assuming for the present purpose that the land in question was copyhold land. Whether it was so or not I shall have presently to determine. But, assuming it to be copyhold, are these coprolites minerals to which the lord is entitled?

Upon this question the greatest light is thrown by the case of *Hext* v. *Gill* (1). It throws light upon the question whether the lord is entitled merely to the mines, or to the mines and minerals. The Court clearly held that the lord of the manor is beyond all question entitled to the minerals, in the most general sense of the word, under a copyhold tenement. "There is nothing," said Lord Justice *Mellish* (2), "to be got out of the soil and sold for a profit which the copyhold tenant, in the absence of some special custom, is entitled to get without the permission of the lord; the property of it is in the lord, although it is true that, in the absence of special custom, the lord cannot get it without the license of the tenant." He also says that "a reservation of minerals includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give it a more limited meaning."

That case, therefore, is a distinct affirmation of these two propositions, that the lord of the manor is, in the absence of custom, entitled to all the minerals, and that the word "minerals" includes every substance which can be got from underneath the surface of the earth for the purpose of profit.

Now coprolites are a substance which can be got from underneath the surface of the earth for the purpose of profit, and therefore

(1) Law Rep. 7 Ch. 669. (2) Law Rep. 7 Ch. 713.

they fall distinctly within the definition of the word "minerals" given in *Hext* v. *Gill* (1); and considering all the circumstances of that case, I feel myself entirely bound by that definition, and I am of opinion, assuming the *locus in quo* to be a copyhold tenement, that the lord of the manor is entitled to these coprolites.

Then comes the question, Is the *locus in quo* freehold or copyhold? Now, there being no title but a possessory one shewn to it, the facts are not clear. The trustee of the Crown is found in possession in 1819. It is not disputed that the *locus in quo* was originally part of the waste, and, if it had been disputed, I think I should on the evidence have come pretty clearly to the conclusion that it was originally part of the waste. It is surrounded on all sides except towards the north-west, where the north-west portion of the *Q Tower* land bounds it, by land which was waste, and the inference to my mind is clear that the old inclosures came down to and included that portion of the *Q Tower* land which is comprised in the admittance of 1810. They bound, at the south and the east, the waste of the manor, including the *locus in quo*. Therefore we start with this: it was originally waste; in 1819 it was in the possession of the trustees of the Crown, and no title is shewn to it. It follows, in my opinion, from these three facts that the *locus in quo* must be admitted to have been at some time an encroachment; and, it being an encroachment, I think I am not at liberty to give that full effect to the *Statute of Limitations* which I must have given to it, if it were not proved that the land had been an encroachment. I say that upon the authority of the principle laid down in *Whitmore* v. *Humphries*, where Mr. Justice *Willes* uses this language (2): "If the general provisions of the statute (of Limitations) apply when the encroachment is on the land of the landlord, what becomes of the general rule of law applicable to all encroachments, namely, that the tenant is estopped from denying that the encroachment forms part of the holding—which, with reference to such a case, is really only another way of saying that he holds in such a way as that the *Statute of Limitations* does not apply. The case of an encroachment is a peculiar case in the law, which treats it as being part of the holding. It follows obviously that the general provisions of the *Statute of Limitations*

(1) Law Rep. 7 Ch. 669. (2) Law Rep. 7 C. P. 8.

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do not apply to it." I say that, there being an encroachment adjoining a holding, I am not at liberty to give that full effect to the statute which it would have had if it had not been shewn that the land was an encroachment in the neighbourhood of an existing holding. I will examine the facts more in detail. As I have already mentioned, it has not been distinctly shewn when the inclosure took place. The land is found to have been inclosed in 1819 by a fence, which included also the land comprised in the admittance of 1810, the two pieces of land forming one inclosure. Upon this state of facts the question arises, Was the inclosure of this land made before or after the grant of the copyhold land? If it was made before, of course the doctrine of encroachment would not apply, and Mr. *Hemming* accordingly contends that the Plaintiffs have acquired a freehold title. If the inclosure was made after the admittance, then I should find a piece of land, which had been waste, inclosed in immediate proximity to another piece of land which the tenant held from the lord, and I must consider that to be an encroachment. This question must be considered from two points of view. In the first place, there is in evidence the license granted to Colonel *Mair* in 1811 to inclose a piece of land containing about five acres, part of the waste. This license expired in 1811. The present steward of the manor swears that he is well acquainted with the land comprised in this license, and that it includes the *locus in quo* upon which the trespass has been committed. If that be so, I think that the inference I am bound to draw is, that the encroachment by the Crown was not made until after 1811; consequently the admittance having been made in 1810, it follows that this was an encroachment made by a copyhold tenant on the waste of the lord after he had been admitted as copyhold tenant. But I am asked by Mr. *Hemming* entirely to disregard Mr. *Watts'* oath with regard to this land, not on the ground that he is unworthy of credit, but on the ground that he can know nothing about it. It must, however, be borne in mind that he is the steward of the manor, and therefore, presumably, he must be taken to be acquainted with the *locus in quo*, and further, he swears that he is well acquainted with the land. I do not, therefore, feel myself at liberty to reject his evidence. It is quite true that doubts have crossed my mind as to how the different

parcels are to be fitted together, and, if I had to form my judgment apart from and independently of his evidence, I might very likely have come to a different conclusion. But I must bear in mind that local knowledge is of the highest importance in determining the identity of property. There may be indications apparent on the face of the ground of changes having taken place between 1811 and the present time, which would enable me, if I saw them, at once to understand the apparent discrepancy between the description of the place in 1808 and the present position of the land. I do not, therefore, feel myself at liberty to reject Mr. *Watts*' evidence, bearing in mind this, that he has not been cross-examined, and that we have no evidence to repel his statements. I therefore give his statements weight, and feel myself bound to conclude that the land now in question was subject to the license to Colonel *Mair* in 1811, and that presumably the Crown cannot have encroached upon it until after that date. I am not at all sure that, even independently of the evidence of Mr. *Watts*, I should not have come to the same conclusion, and, if I had so done, it would have been on this ground: It having been proved that the land was originally waste, and no title being shewn to it, it must have been an encroachment. If an encroachment, it must have been made either before or after the admittance of 1810. If it was made before the admittance, it would have resulted in a freehold title to the encroacher; if it was made after the admittance, it is contended that it would have resulted in only a copyhold title to the encroacher, and I should be inclined to presume that the encroachment was made at that time which would have given the least benefit to the encroacher. Therefore, probably, I should have come to the same conclusion independently of Mr. *Watts*' evidence. There is one other fact remaining to be considered before I approach the legal question, which is this: It is said that there is a custom to grant portions of the waste as copyhold, with the consent of the homage. That custom is not admitted by the Plaintiffs, but it is, in my opinion, sufficiently established. I have before me two admittances, one of the 5th of April, 1849, and the other of the 6th of November, 1857, by which the lord admitted certain persons as copyhold tenants by grant to portions of the waste. There being no contradictory evidence, that is

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enough, in my opinion, to establish the custom. We must, therefore, consider the case in view of these facts—a custom to grant portions of the waste as copyhold with the consent of the homage; the Plaintiffs in possession of a copyhold tenement adjoining the *locus in quo;* an encroachment on the adjoining waste, and, so far as appears, unity of possession and unity of purpose in the user of the two pieces of land.

Now, under these circumstances, what is the presumption of law? It is admitted that there is no reported case with regard to an encroachment on the waste by a copyhold tenant, and therefore I am bound to consider what are the principles upon which the cases with regard to encroachments by leaseholders have proceeded. One principle seems to me to be this, that if you can give a legal origin to the encroachment you will give that rather than an illegal origin. That principle I find expressed by Lord *Campbell,* in his explanation of *Bryan* v. *Winwood* (1), in *Andrews* v. *Hailes* (2). He says this: "*Bryan* v. *Winwood* was the first case; there the lessor of the Plaintiff was lord of the manor, and had therefore a right to approve. The tenant had inclosed part of the waste; and, as that act was illegal unless done for the lord, it might well be held that *primâ facie* it was done for him. But, when the land inclosed belongs to a third person, it does seem strange that the landlord should be supposed to authorize his tenant's theft." The same view is adopted in *Doe* v. *Tidbury* (3) in the considered judgment of the Court of Common Pleas (4), where they say: "Where a tenant who holds under the lord of a manor encroaches upon the waste, he is presumed to have approved against the commoners for the benefit of the lord." In other words, it seems to me that is an illustration of the principle that if you can give a legal origin to the encroachment you will give it that origin rather than an illegal one. Another way in which the case has been put is this, that there is a personal incapacity on the part of the tenant to deny that the encroachment was part of his original holding. That view was thus expressed by Lord *Campbell* in *Andrews* v. *Hailes* (5): "I think it must be considered

(1) 1 Taunt. 208.
(2) 2 E. & B. 352.
(3) 14 C. B. 304.
(4) Ibid. 324.
(5) 2 E. & B. 353.

that the encroachment in this case was held by the Defendant as part of the demised premises; and, that being so, I think the Defendant is not at liberty to deny that it was part of them. I proceed on what the civil law calls *exceptio personalis*, and the common law an estoppel, and say that the tenant cannot deny this." That is to say, he cannot deny that the land acquired by the encroachment was part of his original holding, and the same view is expressed by Mr. Justice *Willes* in his elaborate judgment in *Whitmore* v. *Humphries* (1), to which I have already referred. He says that the tenant is estopped from denying that the encroachment forms part of his holding, and he fortifies that observation by this, that the tenant is under an obligation to protect his landlord's rights with regard to fences, and that if he adds by encroachment he cannot say as against his landlord that he has made default in discharging that duty of maintaining the fences; and to allow him to say the encroachment was not part of the holding would be to allow him to set up that he had not performed that duty which rested upon him. Another view which seems to me to run more or less through the cases is this, that the acts of the encroacher shall be construed as conferring the least possible benefit on him. That is illustrated by the cases in which the encroachment has been made by a tenant for years on the land of a third person, and where, nevertheless, it has been held that he has encroached for the benefit of his landlord.

Now, I must apply those principles to the present case. I do not feel at liberty to refuse so to apply them, although, so far as I know, no case has yet occurred in which the encroacher has been a copyholder and the encroachment has been made upon the waste of the lord. Can I give a legal origin to this encroachment? I think I can. I can infer or presume that an admittance has been made with the consent of the homage to this land as copyhold. It is quite true that no such admittance has been discovered; if it had been found, of course the presumption would not be required. But, in the absence of evidence, I think I am at liberty to presume such an admittance in order to give a legal origin to the encroachment. It is not that I suppose that such a grant or admittance was ever in fact made, but that the encroacher, who is a wrongdoer,

(1) Law Rep. 7 C. P. 8.

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cannot be heard to say, as against the person who might have given him a legal title, that he did not derive such a title from him. Apply, again, the doctrine of personal incapacity to assert that the encroachment was not part of the original holding. Why does not that apply with as much force to the relation of lord and copyholder as to the relation of landlord and tenant? I am at a loss to see. I therefore hold that the tenant is under a personal incapacity to say that the original admittance did not include this land. Try it again by the other view. Shall I give the encroacher the larger or the smaller benefit? I must give him the smaller benefit. He derives a larger benefit if he takes as freeholder, and a smaller benefit if he takes as copyholder. I therefore hold that he made his encroachment as a copyholder. The result is that, in my opinion, the *locus in quo* must be held to be copyhold, and the lord of the manor must be deemed to have had the property in the coprolites. The case of *Doe* v. *Pearsey* (1) tends further to confirm my view.

It only remains to consider what is the measure of damages in such a case. In my opinion Mr. *Hemming* has rightly defined it. The copyholder is in the position of being able to say to the lord of the manor, You shall never get the coprolites. His consent must, therefore, be purchased from him by the lord if he wishes to get them. Everything, therefore, which arises from the sale of the coprolites, and which is not necessary to repay the outlay for the working and to induce a third person to undertake the working, would naturally come to the person who can prevent the coprolites from being dug. He has an absolute veto. The value of that veto appears to me to be the value of the coprolites less so much money as would induce a third person to get them, that is, the measure of damages would be the net returns from the sale of the coprolites less such a sum of money by way of profit as would induce a third person to undertake the enterprise. That I consider to be the proper measure of damage in this case.

Cookson, Q.C.:—The original case of the Plaintiffs was that the whole of the land was copyhold and included in the admittance of 1810. The Defendant had to go into evidence to disprove that,

(1) 7 B. & C. 304.

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and the Plaintiffs, in the amended information, altered their case. The Defendant ought to have the costs of the affidavits which he filed to disprove the Plaintiffs' original case.

FRY, J:—I cannot make any such distinction. If a gentleman chooses, without giving any notice, to pull down fences and dig a trench on land of which the Plaintiffs were in possession, I shall not be particular as to a mistake made by the Plaintiffs about the nature of their title. The bill was filed with the greatest expedition, and the errors in it are such as might have been expected under the circumstances.

It was then arranged that the Defendant should pay over to the Crown half the gross proceeds of the sale of the coprolites, he undertaking to realize them forthwith. The amount of the proceeds to be verified by affidavit.

The injunction was ordered in the terms of the prayer of the information, subject to the proviso that it was to be without prejudice to the right (if any) of the Defendant, as lord of the manor, to enter in respect of a forfeiture or otherwise, according to the custom of the manor.

Solicitor for Crown: *W. Tindal Perkins.*

Solicitor for Defendant: *W. F. Stokes.*

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May 14, 15 16, 17; *June* 5.

PENNINGTON *v.* BRINSOP HALL COAL COMPANY.

[1875 P. 120.]

*Riparian Proprietor—Water Rights—Prescription—Pollution of Stream—Injunction—Injury—Damages—*21 & 22 *Vict. c.* 27, *s.* 2.

The distinction explained between an obstruction to ancient lights and an interference with the water rights of a riparian proprietor with reference to the question whether damages should be awarded in lieu of an injunction.

The difference between "injury" and "damage" illustrated.

Statement.

THE bill in this suit, filed on the 3rd of July, 1875, prayed for an injunction to restrain the Defendants from polluting a stream, called *Borsdane Brook*, near *Wigan*, to the injury of the Plaintiffs, and an inquiry as to damages sustained by the Plaintiffs.

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Statement.

The Plaintiff *Richard Pennington*, junior, was the lessee in possession, and the Plaintiff *Richard Pennington* was the owner in fee in reversion, subject to the lease, of a cotton mill, called *Lowe Mill*, situate on the bank of *Borsdane Brook*. The Plaintiff *Richard Pennington* and his predecessors in title as owners of the mill, and their lessees, had for upwards of forty years used the water of the brook to supply the engine boilers of the mill, and for other purposes connected with the mill. The Plaintiffs claimed, also, as riparian owners, the right to enjoy the water of the brook in its natural purity.

The Defendants were the owners and occupiers of a colliery adjoining the brook, and situate about two miles and a half higher up than the Plaintiffs' mill, and they were in the habit of pumping water from it into the *Borsdane Brook*.

The Plaintiffs alleged that the water was strongly impregnated with sulphuric acid and other deleterious matters, and that it corroded and destroyed iron with great rapidity; the consequence being that the Plaintiffs' boilers and other parts of their machinery were rapidly corroded and destroyed by the water of the brook, and the Plaintiffs were put to much greater expense in the cleaning, repairing, and renewing of their boilers and machinery than was the case before the Defendants commenced their operations.

The Defendants denied that their operations caused any or any appreciable injury to the Plaintiffs. They admitted that the water which they pumped into the brook contained both free sulphuric acid and sulphate of iron, but they alleged that those substances had entirely lost their deleterious character and had become innocuous before they reached the Plaintiffs' mill. They admitted that the water of the brook was in fact polluted when it reached the Plaintiffs' mill, but they alleged that the pollution was wholly due to other sources, and in particular to the water from other mines which was discharged into the brook at points below the Defendants' mine, and they said that if those other sources of pollution were to cease no injury whatever would be done to the Plaintiffs.

The Defendants claimed a right to continue the pumping of their water into the brook. They further said that if the injunction was granted there would be no means of getting rid of the

water from their mines, and they would be obliged to shut up their colliery, and that the water would ultimately find its way by natural channels into the brook and pollute it as much as ever. The closing of the colliery would result in an entire loss of the paid-up capital of the company, amounting to £190,000, and 500 men would be thrown out of employment, whereas the utmost injury (if any) to the Plaintiffs' boilers from all sources, by the impurity of the water of the brook, could not amount to an additional expense of more than £100 a year.

This was the hearing of the cause.

Argument.

Milward, Q.C., *Marten*, Q.C., and *Archibald Brown*, for the Plaintiffs, referred to *Wood* v. *Waud* (1), *Clowes* v. *Staffordshire Potteries Waterworks Company* (2), *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company* (3), *Bickett* v. *Morris* (4), *Embery* v. *Owen* (5), and contended that even if the Plaintiffs could recover only nominal damages, still they were entitled to an injunction to relieve them from the necessity of bringing repeated actions.

Hemming, Q.C., *Gully*, Q.C., and *W. W. Karslake*, for the Defendants:—

No doubt the Court will interpose in a case of very slight damage if the Defendants are really claiming to do what may ripen into a prescriptive right; but we make no such claim. Our case is that our mine water becomes innocuous before it reaches the Plaintiffs' premises, and that what they suffer is wholly due to pollution from other sources.

In the case of an obstruction to light an injunction would not be granted for a mere scintilla of damage. In such a case the Court would only direct an inquiry as to damages: *Aynsley* v. *Glover* (6); *Embrey* v. *Owen* (7); *Wood* v. *Sutcliffe* (8).

[FRY, J., referred to *Dent* v. *Auction Mart Company* (9); *Leech* v. *Schweder* (10).]

(1) 3 Ex. 748.
(2) Law Rep. 8 Ch. 125.
(3) Ibid. 7 H. L. 697.
(4) Ibid. 1 H. L., Sc. 47.
(5) 6 Ex. 353.
(6) Law Rep. 18 Eq. 544; Ibid. 10 Ch. 283.
(7) 6 Ex. 353, 368.
(8) 2 Sim. (N.S.) 163, 165.
(9) Law Rep. 2 Eq. 238.
(10) Law Rep. 9 Ch. 463.

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Argument.

The question is a mere money one to the Plaintiffs, a question of more or less expense in repairing their boilers. The granting of the injunction would be ruin to the Defendants. At the most, therefore, damages ought to be awarded in lieu of an injunction.

Marten, in reply:—

The right of a riparian proprietor is not like the right to light; it may vary in its use from time to time. The damage cannot be ascertained once for all as it can in the case of a permanent obstruction to light: *Holker* v. *Porritt* (1); *Goldsmid* v. *Tonbridge Wells Improvement Commissioners* (2). *Wood* v. *Sutcliffe* (3) is an authority in our favour.

Judgment.

June 5. FRY, J.:—

The Plaintiffs claim both as riparian proprietors and also as having a prescriptive right to the use of the water of the stream for the purposes of their mill. These rights are not denied by the Defendants. The Plaintiffs allege that the Defendants pollute the stream so as to create an injury to the Plaintiffs' rights; and they say, first, that this injury is accompanied by damage; and secondly, that if it be unaccompanied by damage, they have nevertheless a good cause of action. This second proposition of the Plaintiffs is, in my judgment, well founded, and has scarcely, if at all, been contested by the Defendants.

The injury alleged by the Plaintiffs is denied by the Defendants, and the first question which I have to decide is, do the operations of the Defendants cause an injury to the Plaintiffs? I may observe in passing that the case of a stream affords a very clear illustration of the difference between injury and damage; for the pollution of a clear stream is to a riparian proprietor below both injury and damage, whilst the pollution of a stream already made foul and useless by other pollutions is an injury without damage, which would, however, at once become both injury and damage on the cessation of the other pollutions. [His Lordship then reviewed the evidence, upon which he came to the conclusion that it proved that the water pumped by the Defendants into the stream caused both injury and damage to the Plaintiffs. He continued:—]

(1) Law Rep. 10 Ex. 59. (2) Law Rep. 1 Ch. 349. /2 Jur
(3) 2 Sim. (N.S.) 163.

It has, in the next place, been urged upon me that in lieu of an injunction I ought to award damages in this case. The argument has assumed this form: It has been said (and the case of *Embrey* v. *Owen* (1) has been referred to as an authority) that the cases of rights to running water and of rights to air and light are analogous, that in the case of injury done to the right to air and light the Court has frequently granted an inquiry as to damages in lieu of an injunction, and that it would be right and proper to follow the same course in this case. I am of opinion that I ought not to accede to this argument. In the first place, it is to be observed that the injury to air and light proceeds in almost all cases from a permanent structural obstruction, whereas the injury to water in the present case proceeds from a cause which varies from day to day, and may cease or may increase at any time. Hence follows a difference in the measure of damages in the two cases. In the case of an obstruction to light and air, the damages would represent the depreciation in value of the injured property, and so would be in the nature of a compensation for the injury done; whilst in the case of injury to the right to running water the damages given only represent the past injury to the Plaintiffs' right, and are consequently no compensation for the future injury.

Again, the rights of the Plaintiffs as riparian owners are not limited to their present modes of enjoyment; and a new mode of enjoyment gives a right at once to sue for the injury done in respect of such new use, as was determined in *Holker* v. *Porritt* (2), and the cases there cited. It is impossible to foresee what modes of enjoyment the Plaintiffs, or their successors in title, may resort to, or the extent of damages which would be a compensation for the injury which the continued pollution might cause to such new modes of enjoyment.

I shall not, of course, say that, in no case of injury to riparian rights, damages should be awarded in lieu of an injunction, but I know of no case in which it has been done. In the case of *Clowes* v. *Staffordshire Potteries Waterworks Company* (3) the point was considered by Lord Justice *Mellish*, and although he was of opinion that in that case the Plaintiff could only have recovered nominal

(1) 6 Ex. 353.
(2) Law Rep. 10 Ex. 59.
(3) Law Rep. 8 Ch. 125.

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damages, he nevertheless held that an injunction ought to issue, upon the ground of the inconvenience of leaving the parties to repeated and successive actions for damages. If, therefore, in the present case there had been no evidence of actual damage, but merely evidence of injury to the riparian and prescriptive rights of the Plaintiffs, I should have followed this authority; but there is evidence before me which satisfies me that the damage accruing to the Plaintiffs is by no means inconsiderable.

It has been suggested that there are no known modes of purifying the Defendants' water, and that obedience to the injunction will be impossible, or possible only by stopping the Defendants' works and throwing out of employment a large number of workmen. I cannot yield to these suggestions, nor can I find any such balance of inconvenience resulting from the granting of the injunction as would have induced me to refuse it, even if I could have assessed damages in the nature of a compensation, which, for the reasons I have given, I am of opinion that I cannot do. On the whole, therefore, I am of opinion that a perpetual injunction should be awarded to restrain the Defendants from discharging water from their mines and colliery into the stream so as to cause an injury to the Plaintiffs' mill, engine, boilers, and works, or other their premises in the pleadings mentioned, or so as to cause the stream to flow to the Plaintiffs' mill and premises in a state less pure than that in which it flowed thither previously to the commencement of the Defendants' pumping.

If the Defendants desire it, and will undertake to indemnify the Plaintiffs to such an extent and in such manner as the Court may direct, the injunction may be suspended for three months. There must be a reference as to damages sustained by the Plaintiffs, and in my opinion the measure of these damages will be the expenses to which the Plaintiffs have been put by the pollution of the stream. The Defendants must pay the costs of the action.

Solicitors for Plaintiffs: *Gregory, Rowcliffe, & Co.*, agents for *T. R. Taylor, Wigan.*

Solicitors for Defendants: *Chester & Co.*, agents for *Mayhew & Adcock, Wigan.*

LONDON AND PROVINCIAL MARINE INSURANCE COMPANY *v.* DAVIES.

FRY, J.
1877
May 29.

[1876 L. 228.]

Practice—Leave to deliver Interrogatories—Delay—Rules of Court, 1875, *Order* XXXI., *r.* 1—*Costs.*

Though great delay had taken place, leave was given to file interrogatories after the close of the pleadings; costs of the application to be costs in the cause.

Statement.

THIS was a motion for leave to deliver interrogatories after the close of the pleadings. The reply was delivered on the 22nd of December, 1876, and the action was set down for hearing before *Malins*, V.C., on the 1st of February, 1877. On the 3rd of May the action was transferred to *Fry*, J. The pleadings were then laid before counsel, who advised that the Plaintiffs should be interrogated. The Defendants thereupon made an application by summons in the Chambers of *Malins*, V.C., for leave to deliver interrogatories, but the Chief Clerk declined to hear it, as he had no jurisdiction. Notice of this motion was then given, and in the affidavit in support it was stated that the application was not made for the purpose of delay.

Argument.

Romer, in support of the motion:—

It is usual not to deliver interrogatories until the pleadings are closed, as the parties then know what is the case which they have to meet; and the Court has, under Order XXXI., rule 1, full power to give leave. There was no prospect of this case coming on for many months before the Vice-Chancellor, and as soon as it was transferred the pleadings were laid before counsel, who advised that the Plaintiffs should be interrogated.

W. W. Karslake opposed:—

This motion is made merely for the purpose of delay. The Defendants took no step whatever until they found that the action would be soon tried, and then they made this attempt to postpone it.

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Judgment.

Romer, in reply.

FRY, J.:—

I think that there has in this case been undue delay. It is clear that the design of the Orders was that the interrogatories should be delivered not later than the close of the pleadings. It may be convenient to the parties to defer the delivery till afterwards, but that was not the intention of the Legislature. I propose to make an order giving leave to the Defendants to deliver interrogatories to the Plaintiffs within two days from this time; the hearing of the action not to be postponed on account of the interrogatories not being answered; the costs of this motion to be costs in the cause.

Solicitors for Plaintiff: *Crosley & Burn.*
Solicitor for Defendant: *J. H. Lydall.*

FRY, J.

1877

June 6.

WILSON *v.* MORLEY.

[1876 W. 141.]

Will—Debt—Legacy.

A testator directed his debts to be paid, "including a debt of £300 owing from me to my daughter." He owed his daughter £150 only:—
Held, that she was not entitled to receive more than the £150.
Whitfield v. *Clemment* (1) distinguished.

Statement.

THE will of *William Wilson*, dated the 18th of May, 1870, after giving certain specific bequests, proceeded: "I direct that my funeral and testamentary expenses and debts, including a debt of three hundred pounds owing from me to my daughter *Jane Wilson*, be paid and satisfied as soon as may be after my death." A pecuniary legacy was then given, and certain devises were made, and the will then gave certain railway bonds in trust for *Jane Wilson* and her children as therein mentioned; and gave the residue to the children of the testator living at his decease and the issue of children then dead. The testator died in February,

(1) 1 Mer. 402.

1874, possessed of considerable property. In the year 1864 *Jane Wilson* had lent him £150, he giving her an I. O. U. for the money, and continuing to pay her interest thereon.

The executors of *William Wilson* had paid her £150 as the amount due on the I. O. U., and she brought an action claiming a declaration that she was, under the will, entitled to £300, and claiming payment of £150 as the balance.

Argument.

C. Walker, for the Plaintiff:—

The intention of the testator was that his daughter should have £300, and he merely made a mistake in the description of the legacy, but that does not prevent the legacy from taking effect: *Milner* v. *Milner* (1). That was the rule in the Roman law, and the case of *Whitfield* v. *Clemment* (2) is in point. The rule is so laid down in *Williams'* Executors (3).

Byrne, on the other side, was not called upon.

Judgment.

FRY, J., after stating the facts and reading the clause of the will, continued:—

It must be observed in the first place that in this clause the testator is dealing, not with bounty, but with satisfaction of his liabilities, and he proceeds afterwards to confer bounties. The contention of the Plaintiff is that I am to find in the expression "including a debt of £300" a gift of a legacy of £150. In other words, it is contended that the expression of an erroneous belief in an antecedent liability, coupled with the expression of a desire to discharge liabilities, amounts to an expression of an intention to confer a bounty on a person to whom the testator thought himself liable. That cannot be maintained. The Plaintiff, before she can succeed as a legatee, must either shew an express intention to confer a bounty, or must find a similar intention to be inferred from the whole will. Of express intention it is conceded that there is none. The argument, therefore, has turned upon indications, and it has been said that I must infer this intention from the words of the will; but the words seem to me to negative any

(1) 1 Ves. Sen. 106. (2) 1 Mer. 402.
(3) 7th Ed. p. 1201.

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such inference, and to shew only an intention to pay the testator's debts.

The case of *Whitfield* v. *Clemment* (1), before Sir *W. Grant*, has been pressed upon me, and if I thought that case decisive of the question before me I should have followed it whether I understood the reasoning or not. But, when that case is looked at, it is perfectly consistent with the principle which I have laid down. Sir *W. Grant* came to the conclusion that by implication there was a gift of £300 to the legatee, but in that case there was a direction to convert the estate, and in the first place to pay the debts, and in the next place to pay to the Plaintiff the sum of £300, which was stated to be due on bond. That was followed by a legacy of £50 to the Plaintiff. Now, in these three clauses Sir *W. Grant* found an intention to confer a bounty. The direction to pay debts was in one clause, and the direction to pay the £300 was in another clause, and on the whole he considered that there was an intention that £350 should reach the hands of the Plaintiff. He therefore determined that there was by implication a gift of £300. I do not doubt the propriety of that decision, as shewing that there may be a gift by implication. In this case the testator merely shews that he had an erroneous belief, and there is not enough to shew that he had any intention to benefit the Plaintiff.

The question having been raised *bonâ fide*, and being one which the testator's will has occasioned, the costs of the suit ought to be paid out of the estate.

Solicitors for Plaintiff: *Brooks & Co.*
Solicitors for Defendants: *Morley & Shirreff.*

(1) 1 Mer. 402.

WARD *v.* WYLD.

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1877
June 6.

[1876 W. 30.]

Practice—Transfer from County Court—Costs.

Where a Plaintiff commences a suit in the County Court, which at the hearing is transferred to the High Court of Justice because the subject-matter exceeds in amount £500, the Plaintiff, though he succeeds and obtains the general costs of the suit, must pay the costs of the hearing before the County Court.

Statement.

THE Plaintiff in this case had commenced in the County Court of *Lambeth* a suit against the Defendant for the specific performance of an agreement to grant a lease. The Defendant gave notice that she intended to rely on several defences, one of which was that the estate to which the suit related exceeded £500 in value. The suit came on for hearing before the Judge of the County Court, who made an order that it appeared that the subject-matter of the suit exceeded in amount £500, and that, upon the request of the Plaintiff's counsel, it was ordered that the suit be forthwith transferred to the Chancery Division of the High Court of Justice, together with a certificate of the Registrar shewing the state of the suit and the proceedings.

The suit now came on for hearing upon the certificate of the Registrar of the County Court.

Fischer, Q.C., and *Hemings*, for the Plaintiff.

North, Q.C., and *Hollings*, for the Defendant.

Judgment.

FRY, J., after hearing the argument, and having the witnesses examined before him, came to the conclusion that the Plaintiff was entitled to specific performance. As to the costs, the Defendant must pay the costs of the suit, except those of the hearing before the Judge of the County Court. Those costs were occasioned by a mistake of the Plaintiff, and the Defendant might deduct her costs of that hearing from the costs she would have to pay.

Solicitors for Plaintiff: *Shaw & Co.*
Solicitor for Defendant: *W. Davies.*

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June 12.

LYDALL *v.* MARTINSON.

[1875 L. 44a.]

Practice—Adjournment—Costs of Day—Order XXXVI., *r.* 21.

Adjourned. When the hearing of an action is adjourned in order to allow parties to be added, the party who applies for the adjournment must pay all the costs incurred by the action having been in the paper for hearing, and not merely a fixed sum for costs of the day.

Statement. THIS was an action for the specific performance of a contract to sell, in which *J. W. Barnes,* the purchaser, and *J. H. Lydall* and *J. H. Watts,* his incumbrancers, were Plaintiffs, and the vendor and her mortgagees were Defendants. The Plaintiff *J. W. Barnes* died before the reply was delivered, but the other Plaintiff proceeded with the action, and the Defendants were not aware of his death until the 8th of June, on which day the action was in the paper for hearing.

On the cause being called on,

Argument. *North,* Q.C., and *Freeman,* for the Plaintiffs *Lydall* and *Watts,* suggested that the action could very well be tried without bringing the personal representatives of the Plaintiff *Barnes* before the Court.

Cookson, Q.C., *Cozens-Hardy,* and *Yate Lee,* for the Defendants, insisted on the objection.

His Lordship gave the Plaintiffs the option of going on with the hearing if they thought they could succeed in the present state of the pleadings. If not, the Plaintiffs must be understood to apply that as an indulgence the hearing might stand over on terms under Order XXXVI., rule 21.

North then asked that the hearing might stand over, the Plaintiffs paying the costs of the day, which, according to the old rule, were £10 : Cons. Ord. XL., rule 22. At all events, the Plaintiffs ought not to be obliged to pay the costs of the witnesses merely

because the Defendants had chosen to keep them in *London*, knowing that they meant to insist on the objection and to prevent the action from being heard.

HIS LORDSHIP said that the Plaintiffs had chosen to bring the action on to a hearing, and to take their chance, and they must pay the actual costs of the day.

CUR.:—Let the trial be adjourned to this day month, with leave to the Plaintiffs to add parties and to amend; the Plaintiffs paying to the Defendants such costs as have been incurred by the action standing in the paper for hearing on those days on which it stood in the paper.

Solicitor for Plaintiffs: *J. H. Lydall.*
Solicitors for Defendants: *Sharpe, Parkers, & Co.*

BYRD *v.* NUNN.

[1876 B. 1.]

Pleading—Defence—General Denial—Rules of Court, 1875, *Order* XIX., *rr.* 17, 20, 22.

The statement of claim in an action for specific performance stated that the predecessor in title of the Plaintiff, by his agent lawfully authorized, signed an agreement with *H.*, the predecessor in title of the Defendant. The statement of defence denied this in words following the words of the statement of claim, and then proceeded to state that the predecessor in title of the Defendant was of unsound mind, and did not lawfully authorize any one as his agent to sign an agreement, and denied that any agreement was made or signed by *H.*, or any person lawfully authorized:—

Held, that under this statement the Defendant could only enter into evidence to shew the unsoundness of mind, and could not enter into evidence to shew that the agent was not authorized or could not act.

THIS was an action for the specific performance of an agreement to grant a lease stated in the 3rd paragraph of the statement of claim as follows:— Statement.

"On the 20th day of February, 1865, the Defendant's predecessor in title, *John Hutley*, of 1 and 2, *High Street, Bloomsbury*, in the county of *Middlesex*, provision merchant, agreed by writing

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under the hand of his agent thereunto lawfully authorized by writing, with the Plaintiff's predecessor in title, *Anthony Byrd*, of 14, *Walbrook Row*, *East Hill*, *Hoxton*, in the same county, to grant to the said *Anthony Byrd* a lease of the freehold house and premises, No. 77, *Cross Street*, late 30, *Cross Street*, *Islington*, for a term of twenty-one years from the 29th day of September, 1865, at a rent of £60 per annum clear."

The statement of claim then alleged that the Plaintiff had purchased from *Anthony Byrd*, and had been let into possession, and had expended divers moneys on the faith of this agreement, and claimed specific performance.

The 1st paragraph of the statement of defence was as follows:—

"The Defendant denies that on the 20th day of February, 1865, the Defendant's predecessor in title, *John Hutley*, of 1 and 2, *High Street*, *Bloomsbury*, in the county of *Middlesex*, provision merchant, agreed by writing under the hand of his agent thereunto lawfully authorized by writing, with the Plaintiff's alleged predecessor in title, *Anthony Byrd*, of 14, *Walbrook Row*, *East Hill*, *Hoxton*, in the same county, to grant to the said *Anthony Byrd* a lease of the freehold house and premises, No. 77, *Cross Street*, late 30, *Cross Street*, *Islington*, for a term of twenty-one years from the 29th day of September, 1865, at a rent of £60 per annum clear. On the 20th February, 1865, the said *John Hutley* was of unsound mind, although not so found by inquisition, and he was wholly incapable of lawfully authorizing, and did not lawfully authorize, any person as his agent to sign any such agreement as is in the Plaintiff's statement of claim alleged."

The Defendant then denied several other allegations, and alleged that the Plaintiff had been in posssession as a yearly tenant only; and the 5th paragraph was as follows:—"The Defendant denies that any agreement for a lease of the said premises to the Plaintiff or his alleged predecessor in title was ever made, entered into, or signed by the said *John Hutley*, or any person by him lawfully authorized;" and the Defendant claimed the benefit of the *Statute of Frauds*.

The action now came on for trial.

Cookson, Q.C., and *B. Eyre*, for the Plaintiff:—

There is no denial of this agreement having been made, so as to satisfy Rules of Court, 1875, Order XIX., rules 20, 22. The Plaintiff alleges several facts, and not one of them is specifically denied; they must, therefore, under Order XIX., rule 17, be taken to be admitted: *Thorp* v. *Holdsworth* (1). At all events, the Defendant cannot deny that there was an agreement, and that the agent was authorized to make it.

Fischer, Q.C., and *W. W. Cooper*, for the Defendant:—

The Defendant pleads that the Plaintiff was of unsound mind, and also that he did not authorize the agent to make the agreement, and that there was no agreement. The 1st paragraph raises the issue of competence, and the last raises the issues of authority and of fact.

FRY, J.:—

This is a claim for specific performance of an agreement entered into in 1865 by the agent of a person named *Hutley*, and the present question is simply whether the statement of defence has raised the issue that the agent was in fact not authorized by *Hutley*, and in my opinion that issue is not raised. The statement of defence is in these terms:—[His Lordship then read the 1st paragraph.] It is evident that this denial of the allegation in the claim is justified if any one of several circumstances is not true. For instance, if the agreement was entered into on the 19th of February instead of on the 20th, or if *John Hutley* had not been of 1 and 2, *High Street, Bloomsbury*, and so of many other circumstances. This appears to me exactly a case within Order XIX., rule 17, and there is no sufficient denial of any particular allegation. But in the latter part of the paragraph I find an allegation of the fact that *Hutley* was of unsound mind, and that is followed by a conclusion that in consequence of his being of unsound mind he was incapable of authorizing an agreement. This is a substantial answer, and in my opinion that does satisfy the rule, assuming that the point on which the Defendant means to

(1) 3 Ch. D. 637.

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rely is the unsoundness of *Hutley's* mind. If the Defendant meant to rely on anything more, I think that a substantial answer has not been given. The statement of defence denies several facts, and follows that denial by an allegation of one particular fact which justifies that denial, but there is no allegation of any other particular fact which would justify any other part of that denial. There is no doubt a denial in paragraph 5 that any agreement for a lease had been made or entered into by *John Hutley*, or by any person lawfully authorized by him, but that does not, as it stands, enable the Defendant to go into evidence as to the authority of the agent, assuming the soundness of mind of *Hutley*. It appears to me that there are several possible facts which might justify this denial. It would be justified, first, if *John Hutley* was of unsound mind; secondly, if though of sound mind he did not authorize the agent to contract; thirdly, if the agent, though authorized, could not for some reason lawfully contract. I find, therefore, at least three facts which would justify this denial, and one of them alone, viz., the incapacity of *Hutley*, alleged as a fact. I come, therefore, to the conclusion that that denial, being justified by a fact specifically alleged, must be taken to refer to that specific fact and not to the others. If the Defendant desired to set up any other matter of fact which would have led to the same conclusion, he should have done so substantially and specifically, and should have called the attention of the Plaintiff to that fact.

Fischer then asked for leave to amend the statement of defence by striking out that part which alleged the unsoundness of mind of *Hutley*, and adding an allegation that the agent was not authorized to make the agreement. No doubt the Plaintiff must shew that the agent was authorized, and may fail, but the Defendant wishes to be able to state his case.

FRY, J., refused leave, and the case then proceeded.

A witness for the Plaintiff deposed that both he and *Hutley* were present when the agent signed the agreement, and that *Hutley* was of sound mind.

Witnesses were then produced by the Defendant to shew the unsoundness of mind of *Hutley*.

FRY, J., was of opinion that there was no proof that *Hutley* was of unsound mind when the agreement was made; and gave judgment for specific performance.

Solicitors for Plaintiff: *Evans & Eagles.*
Solicitor for Defendant: *J. L. Morris.*

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Nov. 20. 21.
C. A.
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April 16, 17.

RANKEN *v.* ALFARO.

[1874 R. 114.]

Equitable Assignment—Bills of Exchange—Appropriation.

A. consigned coffee to *M., L., & Co.*, and drew bills upon them, which they declined to accept. *R.* was the holder of some of these bills. *A.* finding that *M., L., & Co.* would not accept the bills, wrote to *S.* requesting him to realize the coffee, honour the bills, telegraph for a remittance if the proceeds would not cover the bills, and conduct the business so as to prevent *A.'s* reputation from suffering. On the 14th of August, the day before the day on which the bills held by *R.* became payable, *S.* wrote to him a note specifying the bills and saying, "Take note that I expect to receive early next week delivery of the coffee sent by drawer against the above, and that I will then again write to you on this subject." Three days after this *S.* wrote to *R.*, "Referring to my memorandum of the 14th instant, *M., L., & Co.* have handed me the warrants for the coffee. I shall dispose of the same as instructed by sender, and will let you have further particulars in due time." On the same day *S.* was served with an attachment out of the Lord Mayor's Court at the suit of *M., L., & Co.*, as creditors of *E. A. & Co.*, whom they alleged to have an interest in the coffee. *R.* filed his bill to restrain the proceedings in the Lord Mayor's Court, and to establish his interest in the proceeds of the coffee. Vice-Chancellor *Hall* dismissed the bill on the ground that *R.* had not any specific charge on the proceeds, and therefore had no such title as would support a bill:—

Held, on appeal, that the letters gave *R.* an equitable charge on the proceeds of the coffee, and that he had therefore a *locus standi* to maintain the suit.

Statement.

IN April, 1874, *Yldefonso Alfaro*, of *Costa Rica*, consigned 808 sacks of coffee to *Moses, Levy, & Co.*, of *London*, and on the 5th of April wrote to them as follows:—

"I inclose to you a letter of recommendation of Messrs. *Eloy Alfaro & Co.*, authorizing me to draw on you at the rate of £4 per quintal of coffee which I may ship for my account to your consignment. On the strength of this I have drawn on you the following drafts:

£200, No. 112, to the order of Mr. *Miguel Gilos* at 90 days.
£600, No. 113, „ „ *Adolfo Bonilla* „
£500, No. 114, „ „ „ „

which I hope you will please accept and pay at maturity to the debit of my account.

"My agent, Mr. *Nicolas Peña*, will remit to you a bill of lading of said coffee. Said coffee I request you to have sold for my account, and its proceeds passed to my credit.

"In this transaction Messrs. *Eloy Alfaro & Co.*, of *Panama*, have a share, being interested for half of profit or loss. On the strength of this I hope you will please follow the instructions which said gentlemen may give you."

The above bills for £600 and £500 were drawn on the 31st of March, payable to the order of *A. Bonilla*, were negotiated and came to the hands of the Plaintiffs as holders for value. *Y. Alfaro* also drew other similar bills and negotiated them, the total amount being upwards of £4000. None of the bills shewed on the face of them that they were drawn against any particular goods.

On the 14th of May, 1874, the Plaintiffs presented their two bills for acceptance. *Moses, Levy, & Co.* refused to accept them. The Plaintiffs had them protested for non-acceptance, and held them to await maturity.

On the 17th of June, 1874, *Y. Alfaro* having learnt that *Moses, Levy, & Co.* had refused to accept his bills, wrote to Mr. *Schwarz*, of *London*, a letter, the material parts of which were as follows:—

"At the suggestion of Messrs. *J. Ruatar & Co.*, of *Panama*, I take the liberty of informing you that having made various consignments of coffee for my risk and account to Messrs. *Moses, Levy, & Co.*, and drawn upon them for £4256 14s., as per details at foot, the said bills have not been accepted, they maintaining that my former letter in which I gave them my instructions was never received by them.

"I therefore beg of you to take charge of this consignment, and to realize it, honouring all my drafts which on account of it I drew upon Messrs. *Moses, Levy, & Co.*, and for which you will kindly ask them for a list of the holders of the said drafts. If the proceeds of the coffee should not be sufficient to cover the drafts, telegraph to Messrs. *Eloy Alfaro & Co.*, of *Panama*, so that they may inform me of the sum wanting, which I will immediately remit.

"I inclose you copies of my letters to Messrs. *Moses, Levy, & Co.* for your guidance. I also send you a power of attorney for

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you to claim the consignment of those gentlemen, or else its proceeds, in case it be sold.

"I do not for a moment doubt but that you will attend to this affair as if it were your own, and that you will take all means in your power to prevent my reputation suffering commercially or morally."

The "details at foot" gave a list of bills drawn on *Moses, Levy, & Co.* for sums amounting to £4256 14*s.*, including the above bills held by the Plaintiffs. The Plaintiffs' bills became due on the 15th of August.

On the 15th of August the Plaintiffs received from *Schwarz* a memorandum, dated the 14th, as follows:—

"£600
"£500 } drawn by *Yldefonso Alfaro* on *Moses, Levy, & Co.*

"Please take note that I expect to receive from Messrs. *Moses, Levy, & Co.* early next week delivery of the coffee sent by drawer against the above, and that I will then again write to you on this subject."

On the 17th of August, 1874, *Schwarz* received from *Moses, Levy, & Co.* the delivery warrants for the coffee; and on the same day sent the following memorandum to the Plaintiffs:—

"Referring to my memorandum of the 14th instant, I beg to inform you that Messrs. *Moses, Levy, & Co.* have now handed me over the warrants for the coffee sent by Mr. *Yldefonso Alfaro*, and that I shall dispose of same as instructed by sender, and will let you have further particulars in due time."

On the 17th of August, 1874, *Moses, Levy, & Co.* commenced an action in the Lord Mayor's Court against *Eloy Alfaro & Co.*, and served *Schwarz* with an attachment of all goods and moneys of the Defendants in his hands. *Schwarz*, who had no dealings with *Eloy Alfaro & Co.*, gave immediate notice of this attachment to the Plaintiffs, who thereupon filed their bill against *Yldefonso Alfaro*, *Schwarz*, and *Moses, Levy, & Co.*, praying a declaration that the coffee was specifically appropriated to satisfying the bills of exchange for £4256 14*s.*, and that the Plaintiffs and the other holders of such bills were entitled to the proceeds of the coffee in priority

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to all other persons, and that the proceeds might be distributed accordingly, or that the rights of all parties in the proceeds might be ascertained and the proceeds distributed, and an injunction.

On the 2nd of September, 1874, an interlocutory injunction was granted to restrain the proceedings in the Lord Mayor's Court. The coffee was sold, and the proceeds paid into Court by *Schwarz*, who received his costs out of them, and was then dismissed the suit. *Moses, Levy, & Co.* put in an answer, in which they insisted that *Eloy Alfaro & Co.* had the entire, or, at all events, a very large interest in the coffee, and that it had been shipped by *Yldefonso Alfaro* as their agent. The Court of Appeal considered that there was no evidence in support of this contention.

Statement.

The cause came on for trial before Vice-Chancellor *Hall* on the 20th of November, 1876.

Dickinson, Q.C., and *Rawlins*, for the Plaintiffs :—

Argument.

We claim the fund on the ground that we are the holders of the bills to meet which the coffee was appropriated. The coffee belonged to *Y. Alfaro*. *E. Alfaro & Co.*, though they had an interest in the profits of the adventure, had none in the coffee: *Alfaro* v. *De la Torre* (1). The Plaintiffs would have been paid but for the proceedings in the Lord Mayor's Court, which compelled the Plaintiffs to come here. *Schwarz* dealt with the coffee as appropriated to the bills, and had authority to do so.

Hastings, Q.C., and *Romer*, for *Y. Alfaro* :—

Y. Alfaro does not dispute the claims of the Plaintiffs, but asks that any balance may be paid to him. There were no profits arising from the transaction, and *Eloy Alfaro & Co.* have no interest whatever, nor have *Moses, Levy, & Co.* : *Kendal* v. *Wood* (2).

Robinson, Q.C., and *Alexander Young*, for *Moses, Levy, & Co.* :—

There must be a clear case of appropriation or no relief can be given : *Williams* v. *Everett* (3) ; *Shepherd* v. *Harrison* (4). *Schwarz* was merely an agent, and had no authority to make an equitable assignment, and the letters of *Y. Alfaro* did not make an appro-

(1) 24 W. R. 510.
(2) Law Rep. 6 Ex. 243.
(3) 14 East, 582.
(4) Law Rep. 5 H. L. 116.

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priation: *Robey & Co.'s Perseverance Ironworks* v. *Ollier* (1); *Frith* v. *Forbes* (2); *Thomson* v. *Simpson* (3); *Citizens' Bank of Louisiana, &c.*, v. *Bank of New Orleans* (4).

Dickinson, in reply:—

Frith v. *Forbes* is in our favour. The case is distinguished from *Thomson* v. *Simpson*, and *Robey & Co., &c.*, v. *Ollier*, by the direction to pay the bills.

Judgment, V.-C. H.

HALL, V.C.:—

The argument of Mr. *Robinson*, supplemented by that of Mr. *Dickinson*, and the cases which have been referred to, satisfy me that this bill cannot be maintained. The view which I take, is, that as this case is not identical with *Frith* v. *Forbes* it must be taken to come within the decision in *Robey & Co., &c.*, v. *Ollier*. In *Frith* v. *Forbes* there was one feature which both the Lords Justices adverted to, and on which Lord Justice *Turner* relied, and it was this: that on the face of the bills (at least two of them) it was shewn that they were expressly drawn against the proceeds of the cargo. That circumstance does not exist in the present case. In *Robey & Co., &c.*, v. *Ollier* the Lord Justice *James* said that he was not prepared to hold that the mere circumstance of a bill of exchange purporting to be drawn against a particular cargo, made it carry a lien on that cargo into the hands of every holder of the bill. He said (5): "In *Frith* v. *Forbes* there were grounds for saying that the intention was to give *Frith, Sands, & Co.* an equitable interest in the cargo, for the letters of the consignor to the consignees referred to bills of exchange which the consignor had drawn in favour of *Frith, Sands, & Co.* Here the reference is only to bills which the consignor had drawn to his own order, not mentioning any third parties." Lord Justice *Mellish* did not even advert to the last circumstance. It seems that in the first letter, dated the 5th of April, 1874, which was a letter of advice to *Moses, Levy, & Co.*, mention is made of bills having been drawn upon them on the same terms as heretofore, giving the names on the bills as in *Frith* v.

(1) Law Rep. 7 Ch. 695.
(2) 4 D. F. & J. 409.
(3) Law Rep. 5 Ch. 659.
(4) Ibid. 6 H. L. 352.
(5) Law Rep. 7 Ch. 698.

Forbes (1), but not stating the additional ingredient which was found in that case. Here we have not got the two ingredients which existed in *Frith* v. *Forbes*. Nor have we the additional ingredient of a bill upon the face of it shewing that it is drawn on account of a particular cargo. It appears to me, therefore, having regard to the absence of that feature in this case, that I cannot hold that there was an appropriation of the proceeds of the coffee to the persons in whose favour the bills were drawn, either by virtue of the bills being drawn in their favour, or by the instructions given to the original consignees, *Moses, Levy, & Co.*, or by these two circumstances taken together. The case, therefore, as regards appropriation as originally constituted, does not seem to me to be established. But the case does not remain there. This took place: *Moses, Levy, & Co.* refused to have anything to do with the transaction. Perhaps they were not satisfied that the bills would be covered by the coffee, and they did not accept them. It was their business, therefore, to give up the coffee. The consignor instructed fresh parties to act, as he had before instructed *Moses, Levy, & Co.* to act, viz., *Schwarz*, and he undertook those duties which it was expected *Moses, Levy, & Co.* would undertake to do. For this purpose he must be considered as being in the same position, and there was so far no appropriation of the proceeds any more than there had been in the former case. The bills, which were payable at ninety days' sight, on being presented, were dishonoured and protested. They were then held by the Plaintiffs until they became due, on the 15th of August, 1874. *Moses, Levy, & Co.* furnished *Schwarz* with a list of the names of the persons in whose favour the bills were drawn, and the holders of the bills. *Schwarz* wrote on the 14th of August, 1874, to the Plaintiffs, and gave them particulars of the two bills which the Plaintiffs now hold, and which are set out in the bill. There was no engagement in that letter to do anything with the proceeds of the coffee when he obtained them. He said that he had not got the warrants from *Moses, Levy, & Co.*, but that he expected to have them in the following week, and he promised when he obtained them to write again on the subject. He wrote again on the 17th of August, having received the delivery warrants and the memorandum, which he sent at the same

(1) 4 D. F. & J. 409.

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time. The Plaintiffs, as holders of the two bills, had no conversation with the Defendants as to what the instructions of the consignors were with reference to the proceeds of the coffee. All that *Schwarz* informed them was that he would have certain warrants early in the next week, and would then write again; then, when the warrants had come, he said he would dispose of the same as instructed by the sender. There was no representation that those proceeds were to be applied to one bill of exchange rather than to another, in any particular way, or in any particular order in favour of one person more than another. Everything would be done as instructed, and therefore it seems to me that there was no representation made that the proceeds of the coffee would be applied wholly or partially, or as far as they might extend, to taking up the bills. If it has any other meaning it amounts to this: "I am the person representing the principal—the owner of the goods and the drawer of the bills. There are certain warrants which I shall have, and I shall then have funds." There was no contract, but, as it appears to me, simply the representation of a man who said: "There are certain bills of mine becoming due. I am going to realize certain things, and then I shall be in funds to meet them." But there is nothing in the nature of an equitable assignment or charge upon the funds. It amounted to this: "It is only by disposing of this property that I shall be in a position to make arrangements. At all events, I shall wait for instructions." And those instructions amounted to this, that he was to take up the bills out of the proceeds of the coffee. There was no representation that original instructions were ever given to *Moses, Levy, & Co.*, or, in like manner, to their substitute *Schwarz*, and I do not think there was enough, either in the original instructions or in the second instructions, to amount to an equitable assignment of a certain, sufficient, or rateable share of the proceeds of the coffee to take up the bills. The Plaintiffs' case therefore fails on these grounds, independently of what was argued by Mr. *Robinson*, that it did not appear in the Plaintiffs' case that the principal debtor, the consignor, gave to *Schwarz* authority to make an equitable assignment of any portion of the proceeds to any particular creditor or billholder. There is that additional difficulty in the Plaintiffs' way. The Plaintiffs have,

therefore, filed a bill which is not sustainable, and it has been attempted to sustain it by *Yldefonso Alfaro*, the consignor and owner of the goods, appearing here and saying that he does not dispute but admits the Plaintiffs' claim. There has been a question raised between the Plaintiffs and *Y. Alfaro*, and other persons, and as the Plaintiffs have not made out their case, their bill must be dismissed, and with costs, excepting the costs of *Yldefonso Alfaro*, who, having supported the Plaintiffs' case, must pay his own costs.

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Hastings, Q.C., asked that the fund in Court should be ordered to be repaid to *Y. Alfaro*.

Dickinson, Q.C., supported the application.

Robinson, Q.C. submitted that a petition ought to be presented, or that there ought to be a motion with notice to all parties concerned.

HALL, V.C., refused the application, as other parties ought to have time to bring in their claims, if any, and gave liberty to any party to apply.

The Plaintiffs appealed from this decision. The appeal was heard on the 16th and 17th of April, 1877.

C. A.

Dickinson, Q.C., and *Rawlins*, for the Appellants:—

Argument.

We say that there was an appropriation by the letters of *Schwarz*, written by the authority of *Y. Alfaro*. We do not ask to be paid at once, for there may be other bill-holders in exactly the same position as we are. We only ask for an inquiry. It is clear on the evidence that there was no partnership between *Y. Alfaro* and *Eloy Alfaro & Co.*, except in the profits of the adventure, which does not give *Eloy Alfaro & Co.* any interest in the goods. *Alfaro* v. *De la Torre* (1). *Moses, Levy, & Co.* have therefore no right to attach these goods. As regards the Plaintiffs' title, *Burn* v. *Carvalho* (2), and the other cases of that class are so familiar, that they need not be referred to in detail. It is the simple case of a

(1) 24 W. R. 510.

(2) 4 My. & Cr. 690.

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direction given by the owner of the goods to *A. B.* to hold them for *C. D.*, and communicated by *A. B.* to *C. D.* It is not necessary for us to have recourse to *Frith* v. *Forbes* (1). We have then an interest sufficient to maintain the suit, and are entitled to the relief we ask.

Robinson, Q.C., and *Alexander Young*, for *Moses, Levy, & Co.*:—

The case made by the bill is that *Yldefonso Alfaro* gave a direct charge on the coffee, and that is not made out: *Thomson* v. *Simpson* (2). *Schwarz* had no authority to give a charge on the cargoes, the letter to him merely means that he is to have the coffee to repay himself what he advances in payment of the bills, but it does not authorize him to pledge the coffee to the bill-holders. We further say, that on the fair construction of *Schwarz's* letters they do not purport to give a charge, even if he had authority to give it.

Hastings, Q.C., and *Romer*, for *Y. Alfaro*, took no part in the argument, but stated that they did not oppose the Appellants' case.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I am of opinion that this case turns upon the question what is the true meaning and effect of three letters in a mercantile transaction, and what they would be understood as amounting to by any mercantile man?

We have to say, first of all, whether *Yldefonso Alfaro* gave *Schwarz* authority to create a charge upon the specific fund in favour of the Plaintiffs and the other bill-holders, and whether *Schwarz* acted upon that authority. I am of opinion that when the three letters are read together they shew that there was such authority, and that that authority was acted upon. Beyond all question *Yldefonso Alfaro* from the first intended that the coffee should be sold in this country and the proceeds applied in taking up the bills. Of course he originally expected that the bills would have been accepted by *Moses, Levy, & Co.*, who would have then applied the proceeds to reimburse themselves, but they re-

(1) 4 D. F. & J. 409. (2) Law Rep. 5 Ch. 659.

fusing (as they had a right to do) to accept the consignment of the goods upon the terms which he offered, he writes again to another gentleman, a Mr. *Schwarz*, as follows:—[His Lordship read the letter of the 17th of June, 1874.] These were *Yldefonso Alfaro's* instructions to *Schwarz*. *Schwarz* thereupon applies for the goods, obtains the goods, and at the same time obtains from Messrs. *Moses, Levy, & Co.*, the names of the holders of the bills, in order to put himself in communication with them. For what purpose was he to put himself in communication with them excepting that they had some interest in the goods? He gets then a list of the names of the holders from Messrs. *Moses, Levy, & Co.*, and the Plaintiffs are two of those holders. After this the Plaintiffs receive from *Schwarz* a letter, which in all probability was a circular letter sent to all the holders of the bills whose names had been furnished by *Moses, Levy, & Co.*, in which he says, referring to the two bills which the Plaintiffs hold, "Please take note that I expect to receive from Messrs. *Moses, Levy, & Co.*, early next week, delivery of the coffee sent by *Yldefonso Alfaro & Co.* against the above." That is to say, "Take note that I expect to receive next week the coffee which *Yldefonso Alfaro* has told me he has sent to meet the bills." He sends that letter to one of the holders of the bills, and then afterwards, when he has received the coffee, he writes: "Referring to my memorandum of the 14th instant, I beg to inform you that Messrs. *Moses, Levy, & Co.* have now handed me over the warrants for the coffee sent by Mr. *Yldefonso Alfaro*, and that I shall dispose of same as instructed by sender, and will let you have further particulars in due time." That is to say: "I have received the coffee which *Yldefonso* has sent to make provision for the bills, and I will dispose of the same according to the instructions which I have received from the sender;" which instructions must of course have been instructions telling him to apply them in favour of the bill-holders, for there would otherwise have been no motive for communicating them to the bill-holders. He concludes by saying: "and will let you have further particulars in due time." "Will let you have;" that is treating the Plaintiffs as having a personal interest in the matter. I cannot come to any other conclusion than that these letters amounted to an engagement and representation by *Schwarz*, which *Schwarz* was

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making in order to prevent the reputation of *Yldefonso Alfaro* suffering commercially or morally, and that they are a representation to this effect: "Do not send out the bills, do not sue upon them, do not let them be dishonoured, do not let them go out as dishonoured bills. I am going to receive the coffee and sell it according to instructions which I have already received from the drawer, and I will dispose of the same according to those instructions which provide for their being applied in payment of the bills." So that it appears to me there is a very sufficient charge upon these goods in favour of the Plaintiffs, and that that charge being established the Plaintiffs had a sufficient *locus standi* in this Court to institute this suit, which was only rendered necessary by reason of the claim of Messrs. *Moses, Levy, & Co.*, who were proceeding under an attachment of the Lord Mayor's Court against the firm of Messrs. *Eloy Alfaro & Co.* *Yldefonso Alfaro* was ostensibly the owner of the goods, and says: "I am not only the *primâ facie* owner of the goods, but I am in truth the owner." *Y. Alfaro* has sworn that, and has been cross-examined upon it, without shaking his evidence in the least. It appears to me, therefore, that the Plaintiffs ought to have succeeded in this suit, and that they are entitled to a decree declaring that Messrs. *Moses, Levy, & Co.* have no claim on the fund under the attachment, and directing an inquiry in Chambers as to who are the incumbrancers on the fund, and what are their respective priorities. *Moses, Levy, & Co.* must pay the whole of the costs in the Court below and here, and the injunction against proceeding in the Lord Mayor's Court will be made perpetual.

Mellish, L.J.

MELLISH, L.J.:—

I am of the same opinion. The first question is whether *Yldefonso Alfaro's* letter of the 17th of June gives authority to *Schwarz* to pledge the proceeds of the goods to the bill-holders; that is to say, to give a pledge to the bill-holders that the proceeds of the goods would be applied in payment of the bills.

Now, one must look at the position of the parties. The bills were not drawn on *Schwarz*, but they had been drawn on *Moses, Levy, & Co.* They had been dishonoured, and *Yldefonso Alfaro* was very anxious that they should not be sent back to him at *Costa*

Rica, and there be made a claim against him. What he says is, "I therefore beg of you to take charge of this consignment, and to realize it, honouring all my drafts which on account of it I drew upon Messrs. *Moses, Levy, & Co.*, and for which you will kindly ask them for a list of the holders of the said drafts. If the proceeds of the coffee should not be sufficient to cover the drafts, telegraph to Messrs. *Eloy Alfaro & Co.*, of *Panama*, so that they may inform me of the sum wanting, which I will immediately remit." Then he says at the end: "I do not for a moment doubt but that you will attend to this affair as if it were your own, and that you will take all means in your power to prevent my reputation suffering commercially or morally." Now, how was *Schwarz* to carry out the instructions contained in that letter? One mode in which he might have carried it out, certainly, would have been to pay the bills, or to make himself personally liable to pay them by accepting them for honour, or giving a guarantee for them. That, perhaps, is the thing that he was primarily asked to do; and if he had done that, the coffee would have been pledged to him, because it is quite plain that if he had taken up the bills, this would amount to a perfectly valid pledge of the coffee in his favour, for the money that he would have advanced upon the bills; or if he had accepted the bills for honour, or given a guarantee, it would have amounted to a pledging of the coffee by way of indemnity against the amount for which he had so become liable. No doubt that is what he was authorized to do and what he was asked to do. But the letter contemplates that possibly the coffee would not be sufficient to pay the bills in full, and it says that in that event he (*Yldefonso Alfaro*) will remit the amount of the deficiency. Supposing, then, that it happened, as it was very likely to happen, that *Schwarz* was unwilling to incur the personal liability of being himself liable to the extent to which the bills might exceed the proceeds of the coffee, did this letter leave him no choice? Was he bound to make himself personally liable for that difference, or else to allow the bills to go back. In my opinion, looking at the fact that the coffee was unquestionably to be pledged for the amount of the bills (because it was to be pledged to him), and looking at the general instructions at the end of the letter, it amounts to this: "Do what you can for me, act as if you were

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acting for yourself, do the best you can for me;" and with such instructions as those, if *Schwarz* was unwilling to undertake the personal responsibility or liability of paying the bills, it was quite competent for him to carry out the wishes of *Yldefonso Alfaro* by selling the coffee and applying the proceeds in payment of the bills. I am of opinion that it was perfectly competent to him to inform bill-holders that that was what he intended to do, and pledge himself to carry out those instructions, in order to induce them not to send back the bills to make a claim against *Yldefonso Alfaro*. Well, then, having that authority, how did he act? He first writes to the Plaintiffs, "Take note that I expect to receive from Messrs. *Moses, Levy, & Co.* early next week delivery of the coffee sent by drawer against the above, and that I will then again write to you on this subject."

Now I do not read that letter alone as amounting to a pledge, because it does not tell us what particular course he means to adopt when he gets the warrants, whether he will pay the balance himself, or whether he will pledge himself to pay the bills, or whether he will merely apply the proceeds in payment of the bills; but I think it does give an intimation that if he got the coffee he had received instructions from *Yldefonso Alfaro* to sell it and apply the proceeds in payment of the bills. I think that is what any mercantile man would understand to be meant by saying, "Coffee sent by the drawer against the above." The letter really amounts to this: "I beg to inform you that the coffee was originally sent to Messrs. *Moses, Levy, & Co.* with the intention that the bills should be paid out of the proceeds, but now I have got instructions to act instead of them, and when I get the coffee I will write to you again." Then he does write to them again: "Referring to my memorandum of the 14th instant, I beg to inform you that Messrs. *Moses, Levy, & Co.* have now handed me over the warrants for the coffee sent by Mr. *Yldefonso Alfaro*, and that I shall dispose of same as instructed by sender, and will let you have further particulars in due time." The Plaintiffs would not understand those words, "I shall dispose of the same as instructed by the sender," as meaning, "I shall dispose of them as the sender may hereafter instruct me, and therefore if he tells me to dispose of them so as to pay somebody else's debt, and not to

pay yours, I shall not pay yours at all." Their fair meaning is, "I have told you in my previous letter that I have received instructions to sell the goods, and to apply the proceeds in payment of the bills, and I now tell you that I shall obey those instructions which I have so received." In my opinion, the Plaintiffs, as mercantile men, would so understand these letters, which are mercantile letters expressed in mercantile language. We have to say how they would be understood by the parties writing and by the parties receiving them, and, in my opinion, there is no doubt that they would be understood as amounting to a pledge on behalf of Mr. *Schwarz* that he would carry out those instructions, and as sufficiently explaining what those instructions were, viz., to sell the coffee and apply the proceeds in payment of the bills. That being so, in my opinion the Plaintiffs have a valid charge.

Judgment, C. A. Mellish, L.J.

The only other question is whether these goods are really the goods of *Yldefonso Alfaro*, or whether they are the goods of *Eloy Alfaro & Co.* With respect to that, the only evidence is *Yldefonso Alfaro's* affidavit that they belonged to him, and there is no legal evidence to contradict it. All the evidence that is offered against it is that *Eloy Alfaro* had written some letters which led Messrs. *Moses, Levy, & Co.* to suppose they would get some coffee from him, but that is no evidence against the Plaintiff or against *Yldefonso Alfaro.* If the letters are admitted they prove nothing; they do not prove to whom the coffee really belongs, and the burden of proof is clearly on *Moses, Levy, & Co.*, as *primâ facie* it must be taken to have been the coffee of *Yldefonso Alfaro.* I am of opinion, therefore, that it is to be taken as his, and is effectually pledged in favour of the Plaintiffs.

BAGGALLAY, L.J. :—

Baggallay, L J.

I am of the same opinion, and have nothing to add.

Some discussion then took place as to the form of order, and it was directed that there should be a declaration that the Plaintiffs acquired a charge on the coffee; a declaration negativing any claim arising from the attachment in the Lord Mayor's Court; an inquiry whether any of the holders of the bills mentioned in *Y. Alfaro's* letter to *Schwarz* had acquired a charge, and if so, an

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inquiry as to priorities; *Moses, Levy, & Co.* to pay the Plaintiffs' costs (including the costs of *Y. Alfaro* to be paid by the Plaintiffs), and to pay into Court to the credit of the cause the costs of *Schwarz* which had been paid to him out of the fund without prejudice to the question by whom they should ultimately be borne. Liberty to apply in Chambers as to the distribution of the fund.

Solicitors: *Kynaston & Gasquet; Murray, Hutchins, & Co.; Hollams, Son, & Coward.*

C. A. 1876 C. J. B. *Nov.* 27. C. A. 1877 *April* 12, 19.

Ex parte KIRK. *In re* BENNETT.

Will—Construction—Bequest of Debt due from Legatee—Release—Joint and Separate Debts.

A testator bequeathed "all debts which shall be due to me by *B.* at the time of my decease unto *B.*, his executors, administrators, and assigns, for his and their own use and benefit." And the testator directed his trustees "to deliver up to *B.*, his executors, administrators, or assigns, all securities whatever which I shall hold at the time of my decease for securing the repayment of such debts, and that the trustees shall, when required by *B.*, his executors, administrators, or assigns, give and execute to him or them an effectual release from the payment of all such debts."

At the date of the will and at the time of the testator's death there was due to him from *B.* a sum of £50, for which *B.* had given the testator his promissory note. There was also due to the testator from a partnership firm consisting of *B.* & *G.* a sum of £300, for which *B.* & *G.* had given the testator their joint promissory note, and a sum of £2300, for which *B.* & *G.* had given him their joint and several promissory notes:—

Held, that, there being a private debt of *B.* which satisfied the words of the bequest and release, those words could not be construed as including the partnership debts.

Decision of *Bacon*, C.J., reversed.

Statement.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

John Kirk, by his will, dated the 12th of March, 1872, bequeathed "the sum of £2600, part of the sum now owing to me by my son *H. A. Kirk* and his partner, *D. Jowett*, unto my wife, my son-in-law *Thomas Child*, and my son-in-law *J. E. Bennett*, their executors, administrators, and assigns," upon certain trusts therein declared for the benefit of the testator's daughter *Charlotte*

Bennett, the wife of *J. E. Bennett*, and her husband and children. And the testator bequeathed "the sum of £1000, other part of the money owing to me by my said son *H. A. Kirk* and his said partner, *D. Jowett*," to the same three trustees, upon trust for the testator's wife for her life, and after her death upon trust for his daughters Mrs. *Child* and Mrs. *Bennett*, and his son *H. A. Kirk*, in equal shares. And the testator also (by a later clause in the will) bequeathed "all debts and sums of money which shall be due and owing to me by the said *J. E. Bennett* at the time of my decease, and all interest and arrears of interest which shall then be due and owing in respect thereof, unto the said *J. E. Bennett*, his executors, administrators, and assigns, for his and their own use and benefit. And I direct that the trustees or trustee for the time being of this my will (other than the said *J. E. Bennett*) shall with all convenient speed after my decease deliver up to the said *J. E. Bennett*, his executors, administrators, or assigns, all securities whatever which I shall hold at the time of my decease for securing the repayment of such debts and sums of money and interest thereon. And I direct that the trustees or trustee for the time being of this my will (other than the said *J. E. Bennett*) when and if thereunto required by the said *J. E. Bennett*, his executors, administrators, or assigns, shall give and execute unto him or them a good and effectual release from the payment of all such debts and sums of money and interest, such release to be prepared at the expense of the party or parties requiring the same." And the testator appointed his wife, *Thomas Child*, and *J. E. Bennett*, trustees and executors of his will. The testator died on the 25th of February, 1873, and his will was proved by all the three executors. *H. A. Kirk* (the son) and *Jowett* did not at the date of the will or at the date of the testator's death owe him a debt of £3600. The testator had formerly carried on business in partnership with *H. A. Kirk* and *Jowett*. The partnership was dissolved on the 4th of August, 1871, and £2500, part of the sum of £3500 which was then ascertained to be the testator's share of the capital of the firm, was paid by *H. A. Kirk* and *Jowett* to the testator in cash, and they then also gave him two promissory notes of £500 each for the balance of £1000. At the date of the will and at the date of his death these promissory notes were still unpaid, and this debt

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of £1000 was the only debt due to the testator from *H. A. Kirk* and *Jowett* at either of those periods.

J. E. Bennett carried on business in partnership with *J. Glave*. On the 19th of May, 1869, the testator lent them £300 on the security of their joint promissory note, and on the 7th of August, 1871, he lent them £2300 on the security of five joint and several promissory notes given by them. These sums of £300 and £2300 (making £2600) remained due from *Bennett & Glave* to the testator at the date of his will and at the date of his death. At neither of those periods was any debt of £2600, or any larger debt, due to the testator from any other person. At the date of the will and at the date of the testator's death *Bennett* owed him £50 on his private account, to secure which he had given the testator his separate promissory note. After the death of the testator *Bennett & Glave* paid interest half-yearly on the £2600 to the trustees of the will up to the 7th of February, 1875. In April, 1875, *Bennett & Glave* filed a liquidation petition. The executors tendered a proof in the liquidation for the £2600 and interest. The trustee rejected the proof. The Judge of the *Leeds* County Court (Mr. *Daniel*, Q.C.) ordered the proof to be admitted, on the ground that evidence was admissible to explain the latent ambiguity in the will, and that the above-stated facts shewed that the testator's intention was to give the £2600 due from *Bennett & Glave* upon the trusts above stated. Consequently the release could not be construed as extending to any debt but the £50 which was due from *Bennett* alone.

The trustee appealed to the Chief Judge. The appeal was heard on the 27th of November, 1876.

Argument.

West, for the Appellant:—

The terms of the gift to *Bennett*, and the direction that a release shall be executed to him, are plain, and are sufficient to include the partnership debt. It is said that the testator had made a mistake, and that he had already given the £2600 to his trustees on trust for Mrs. *Bennett* and her children. Parol evidence cannot be admitted to shew what was the testator's intention: *Miller* v. *Travers* (1). The doctrine of *falsa demonstratio* only permits the rejection of surplus words; the Court

(1) 8 Bing. 244.

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cannot add to the words of the will, or substitute other words for them: *Jarman* on Wills (1); *Selwood* v. *Mildmay* (2); *Lindgren* v. *Lindgren* (3); *Quennell* v. *Turner* (4). The legacy of £2600 may be payable out of the testator's general personal estate. That will not affect the trustee in the liquidation. The payment of interest by the debtors makes no difference; it was a mere voluntary payment.

Argument.

Roxburgh, Q.C., and *W. Barber*, for the executors:—

The whole scope of the will shews that the intention was to give the £2600 due from *Bennett & Glave* in trust for Mrs. *Bennett* and her children. The ambiguity is latent, and evidence is admissible to explain it. The name of the debtor may be omitted, and there will remain a bequest of a debt, and evidence is admissible to shew from whom a debt of that amount was due. It is a case of misdescription. The gift to *Bennett* of debts due from him is fully satisfied by the £50 due from him alone. The payment of interest after the death of the testator is evidence of a family arrangement which the Court will not now disturb. It was at that time to the interest of *Bennett & Glave* to claim the benefit of the release, but they knew what the testator meant, and honestly endeavoured to carry it out.

Judgment, C. J. B.

BACON, C.J.:—

I should have said that this case was too clear for argument but for the judgment of the learned Judge of the County Court, for whom I have the most unbounded respect. It is the simplest case that can be suggested. Persons alleging themselves to be creditors of the liquidating debtors come with a proof of debt, and say, "There are £2600 due to us as the executors of Mr. *Kirk*." The answer which the trustee makes to them is, "Mr. *Kirk* has released that debt by his will." [His Lordship read the bequest to *Bennett*.] The question is, is that a good release or not? Had the testator the power to release the debt? It is undeniable that he had, and he has done it by the words of the will. No one can deny it. The case of the executors is this—if

(1) 3rd Ed. vol. i. pp. 393, 395.
(2) 3 Ves. 306.
(3) 9 Beav. 358.
(4) 13 Beav. 240.

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you look at the whole of the will and construe it, you will see that the testator did not mean to release this particular debt of £2600. For that purpose the prior bequest of £2600 is referred to, by which it appears that the testator, under circumstances to which I can pay no attention, spoke of a debt of £2600 as owing to him from his son *H. A. Kirk* and his partner *Jowett*. As a question of construction, this may be of interest to the parties entitled under the will; they may say there is a *falsa demonstratio*. Evidence is admissible for that purpose to the extent of shewing what is meant by the words which the testator has employed, though not for the purpose of shewing what was the intention of the testator. For the latter purpose no evidence is admissible. Evidence is admissible only to shew that when he said "£2600 due from *Kirk & Jowett*," he meant something else, because there was no such sum due from *Kirk & Jowett*. It may, for aught I know, but I give no opinion about it, be a good legacy of £2600 out of the general estate. But how can that affect the creditors of *Bennett & Glave*, or how could it have affected *Bennett & Glave* if they had not become bankrupt? The cases which have been referred to carry the rule no further than I have stated. The law is plain. You may shew how a *falsa demonstratio* arises, but that is all you can do. You cannot add to the intention of the testator; you cannot add to the gift which he has made. You may correct the mistake into which he has fallen, but that is all you can do. And when that is done, and when you have proved ever so clearly (if I could adopt the reasoning which has been addressed to me) that this testator must needs have meant in the bequest of £2600 the debt due from *Bennett & Glave* (which would be adopting that which I am entirely adverse to doing), then comes the release in the subsequent part of the will of £2600 as *Bennett's* debt and not *Kirk's*. *Bennett* is released from that. The two clauses would in that sense be repugnant, but the latter clause must prevail. It would be repugnant to say with one breath, *Bennett* shall pay to my executors £2600, and with the other, my executors shall never call in one shilling of what *Bennett* owes me. The question really turns upon the words of the release. The release is good in law and in equity. There can be no doubt that the testator's expressed

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intention was to release *Bennett*. His words are, *Bennett* from the time of my death stands released from every debt then owing to me from him. The argument is founded on there being a private debt owing from *Bennett*. If so, that is released. The matter is, as I have already said, too clear for argument, and the trustee was right in rejecting the proof.

Judgment, C. J. B.

An argument was founded upon *Bennett & Glave's* having paid interest on the £2600. How can that alter the case? The question has now to be decided. They forbore to raise it. The payment of interest on a debt which does not exist cannot make it a debt. By the release it had ceased to be a debt. The payment of interest brings no legal consequences. It could no more revive the debt than it could revive the testator.

C. A.

From this decision the executors appealed. The appeal was heard on the 12th of April, 1877.

Argument.

Roxburgh, Q.C., and *W. Barber*, for the Appellants, repeated the arguments which they adduced before the Chief Judge, citing *Goodlad* v. *Burnett* (1), *Lindgren* v. *Lindgren* (2), *Grant* v. *Grant* (3), *Penticost* v. *Ley* (4), and *Ellis* v. *Eden* (5).

[MELLISH, L.J., referred to *Charter* v. *Charter* (6) and *Morrice* v. *Aylmer* (7).]

West, for the trustee:—

Selwood v. *Mildmay* (8), *Lindgren* v. *Lindgren*, and *Miller* v. *Travers* (9) are in my favour.

[JAMES, L.J., referred to *Dobson* v. *Waterman* (10).

Roxburgh referred to *Day* v. *Trigg* (11).]

The words of the release, according to their proper construction, extend to the partnership debt.

[He referred also to *Wigram* on Extrinsic Evidence (12).]

(1) 1 K. & J. 341.
(2) 9 Beav. 358.
(3) Law Rep. 5 C. P. 380, 727.
(4) 2 Jac. & W. 207.
(5) 25 Beav. 482.
(6) Law Rep. 7 H. L. 364.
(7) Law Rep. 7 H. L. 717.
(8) 3 Ves. 306.
(9) 8 Bing. 244.
(10) 3 Ves. 308, n.
(11) 1 P. Wms. 286.
(12) 4th Ed. p. 111.

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Roxburgh, in reply :—

The intention was to give a debt of £2600 owing to the testator; it is immaterial from whom it was due, or whether it formed part of a larger debt.

As to the release to *Bennett*, the Court is not construing a legal release by deed; the question is, what was the testator's intention?

The judgment of the Court (*James*, *Mellish*, and *Baggallay*, L.JJ.) was reserved, and was delivered on the 19th of April, 1877, by

Judgment, C. A.

JAMES, L.J., who, after stating the facts, continued :—

The County Court Judge was of opinion that, upon clear evidence of the mistake which the testator had evidently made, the legatees were intended to receive the £2600 due from the testator's son-in-law and his partner, and thereupon, with the aid of that evidence, he came to the conclusion that the release could not have been intended to apply to that sum.

The Chief Judge was of opinion that the case must be decided mainly on the construction of the release, and he held that that included the partnership debt of *Bennett & Glave*, as well as the separate debt of *Bennett*. In our view of the case it is not necessary to determine the point which was mainly discussed before and decided by the County Court Judge, and, not being necessary, it is not advisable that we should express our opinion as to what the Court could do to rectify the mistake which, beyond all question, was made by the testator. We are of opinion that the matter may be determined merely upon the construction of the gift to the son-in-law himself.

Now in legal language, and, what is perhaps of more importance in a question of this kind, in the vernacular of ordinary and business life, a debt due from an individual is a totally distinct thing from a debt due from a firm, society, or partnership of persons of which that individual happens to be a member. No customer at *Coutts'* bank would think of talking of his balance at that bank as a debt due to him from the Baroness *Burdett Coutts*. If the son of a maltster was a partner in a large brewery firm, and the father had by his will released the son from all debts due from

him, nobody would suppose that the testator was releasing the brewery firm from a debt for malt which might have been supplied to them by him. People do not talk of debts due from a firm as debts due from an individual member of the firm, and in our judgment it is impossible to believe that this testator, when dividing his large property amongst his family, could have meant to make a present of a debt, not to his son-in-law, but to the firm in which the son-in-law was a partner. Now there happens to be a debt due, strictly speaking, from the son-in-law to his father-in-law, which strictly answers the description in the will, and which would be a debt to be released. The testator would not have been talking of releasing to the executors, administrators, or assigns of his son-in-law—he would not have given the debt to the executors, administrators, and assigns of his son-in-law after his death—if he meant the words to apply to the firm's debt. The whole language of the clause seems to me to apply entirely to the private debt of the son-in-law.

It is true that the debt of the firm was as to £2300, the greater part of it, secured by the joint and several promissory notes of the two partners. But, in our opinion, that does not really make any difference. The character of the debt is not altered by that. The promissory notes were merely securities for the firm's debt, and the personal obligation of each partner was a separate obligation as a surety for the firm. If either of the partners had been called upon to pay his promissory note, he would not have been paying it as his own debt, but as the debt of the firm. He would have applied the assets of the firm to pay it, if he could put his hand upon them; but, if he had been obliged to pay it out of his own money, the payment would have been credited to him in the partnership books as so much of the partnership debts paid by him. Therefore it does not appear to us that the mere fact that there were securities given in that form alters the nature of the debt, which still was and remained a joint debt due from the firm.

There is a case which is to some extent the converse of the present case, and which may be usefully referred to. It was not, I think, referred to in the Courts below. I mean the case of *Maybery* v. *Brooking* (1), which was decided by the Lords Justices *Knight*

(1) 7 D. M. & G. 673. 2 Jur. N. S. 76

C. A. 1877 *Ex parte* KIRK. *In re* BENNETT. Judgment, C. A.

Bruce and *Turner*. There a testator bequeathed a debt, which he described as due to him from the legatee's late husband. At the date of the will, and at the time of the testator's death, the estate of the legatee's husband was indebted to a firm in which the testator was a partner, but was not indebted in any other way to the testator, and for a portion of the debt the husband had given a promissory note to the testator alone, and thereupon, upon all the circumstances of the case, the Court came to the conclusion that the testator must have meant to give his share of the debt which was due to the partnership. The language of Lord Justice *Knight Bruce* was this (1): "The promissory note has created the only difficulty, since it must be agreed that, if a testator bequeath to a legatee a debt due from a particular person or estate, and there is at the time not in any sense a debt due from that person or estate to the testator, except a debt due from that person or estate to the testator and another person jointly, there being in that state of things nothing strictly answering the terms of the bequest, that which did exist and most nearly answered the description in the will must be intended by it, subject to any difficulty as to the rights of the other joint tenant." Now, to apply that to the present case, if there had been no debt due to the testator from the son-in-law, except the debt due from him and his partner jointly, there being then nothing to answer the words of the bequest, we should probably have had to apply the gift in some way or other, having regard to the liabilities of both parties, to the joint debt. But, there being a debt due from the legatee alone, strictly answering the description, the proper course is to apply the words to that debt only which strictly answers the description. We are of opinion, therefore, that that clause of the will does not operate as a release of the debt due from the firm, and that the decision of the County Court Judge admitting the proof must be sustained.

Solicitors for Executors: *Ridsdale, Craddock, & Ridsdale*, agents for *Thomas Turner, Leeds.*

Solicitors for Trustee: *Torr & Co.*, agents for *B. C. Pullan, Leeds.*

(1) 7 D. M. & G. 676. 2 Jun 1877.

Ex parte FLETCHER. *In re* HENLEY.

C. A.
1877
April 19.

Unregistered Bill of Sale—Bankruptcy of Grantor—Possession—Attempt to take Possession before Default by Grantor—Bills of Sale Act, 1854 (17 & 18 *Vict. c.* 36), *ss.* 1, 7.

Actual possession taken by the grantee of an unregistered bill of sale, even though taken wrongfully, may exclude the operation of the *Bills of Sale Act*.

But, though when possession is taken rightfully the possession will be extended by construction of law beyond the actual physical possession, this will not be done in the case of a wrong-doer. His possession will not be constructively extended beyond his actual physical possession.

Furber v. *Finlayson* (1) questioned.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Spring Rice*, sitting as Chief Judge in Bankruptcy.

By an indenture of mortgage, dated the 15th of February, 1875, and made between *W. T. Henley*, who carried on some large ironworks, of the first part, various other parties of the second, third, fourth, fifth, and sixth parts, *R. J. Wigram*, *W. Leask*, and *A. Sim* (called the mortgagees) of the seventh part, and *John Hollams* of the eighth part, in consideration of £45,000 advanced by the mortgagees to *Henley* (which was mainly employed in paying off prior mortgages), *Henley* covenanted with the mortgagees to pay to them the £45,000, with interest thereon at the rate of 6 per cent. per annum, on the 15th of August, 1875, and also for the payment of interest half yearly in the usual way in case the £45,000 should not be paid on the day appointed. The deed contained covenants to surrender certain copyhold property, including the ironworks called the *Pontnewynydd Works*, situate near *Newport*, in *Monmouthshire*, to the use of the mortgagees in fee, according to the custom of the manor of which the same was held, subject to the powers and provisoes in the deed contained. The deed also contained an assignment by *Henley* to the mortgagees of "all and singular the plant, machinery, fixtures, materials, tools and implements, now belonging to the said *W. T. Henley*, in or upon the said copyhold land and hereditaments hereinbefore covenanted to be surrendered, or any part thereof," subject to the powers and pro-

(1) 24 W. R. 370.

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visoes thereinafter contained. The deed contained a proviso for surrender of the copyhold property and reassignment of the chattels to the mortgagor on payment of the £45,000, with interest, to the mortgagees in manner provided by *Henley's* covenant for payment. There was a declaration that "any buildings, engines, plant, and machinery which shall be erected or placed or used upon the said copyhold hereditaments, or any part thereof during the continuance of the present security, either in lieu of or in addition to any buildings, engines, plant, and machinery now standing or being thereon, shall be included in the present security, and be subject to the provisions herein contained." A power of sale in the ordinary form was given to the mortgagees, to be exercised at any time or times after the 15th of August, 1875. There was a proviso that it should be lawful for *Henley*, his heirs, executors, administrators, and assigns, "to hold and enjoy all the said premises hereinbefore covenanted to be surrendered and assigned, and to receive and take the rents and profits thereof, until default shall be made in payment of some principal moneys or interest, according to the covenant and provisions hereinbefore contained," without any interruption or disturbance by the mortgagees. There was a covenant by *Henley* that "if default shall be made in payment of the principal moneys intended to be hereby secured, or the interest for the same, or any part thereof respectively, at the time and in manner in that behalf hereinbefore appointed and provided, it shall be lawful for the said mortgagees or mortgagee to enter into and upon all and singular the said premises hereinbefore covenanted to be surrendered and assigned respectively, and the same thenceforth to hold and enjoy and receive the rents and profits thereof," without any interruption or disturbance.

The deed was not registered under the *Bills of Sale Act.*

The *Pontnewynydd Works* were very extensive, covering a large extent of ground.

On the 1st of April, 1875, at 11.30 A.M., *Henley* filed a liquidation petition in the *London* Bankruptcy Court. On the 31st of March, 1875, the mortgagees, having heard that he had stopped payment, had given instructions to their solicitors to take possession of the property comprised in the mortgage deed. The same evening a clerk of the solicitors, named *Hawksley*, went down to

Statement.

Newport by train, and on the morning of the 1st of April he went over to the works, accompanied by a broker. As soon as they arrived at the outer gate of the works, which was about 10.50 A.M., the broker affixed to one of the gate-posts a printed notice, signed by the solicitors to the mortgagees, which stated shortly the effect of the mortgage deed, its date, and the names of the mortgagees, and gave notice that, by virtue of the deed, the mortgagees had by their solicitors and agents entered into possession and retained possession of the land and buildings, and of all and singular the plant, machinery, fixtures, materials, tools, and implements thereto belonging. The notice was dated the 1st of April, 1875. After this had been done *Hawksley* went into the manager's office and demanded possession under the deed, and required that the works should be at once stopped and the workmen dismissed. The manager himself was not there, and some time was occupied in a discussion with the assistant manager, and in reading the mortgage deed. While *Hawksley* was in the manager's office the broker posted up copies of the printed notice in various places inside and outside the works. Ultimately, in the course of the day, possession of the property was given up to the mortgagees, and the works were stopped. But, in the opinion of the Court of Appeal, the result of the evidence was, that, before the time when the petition was filed, *Hawksley* had not succeeded in obtaining actual physical possession of anything.

The trustee claimed the chattels. The Registrar was of opinion that, inasmuch as the mortgagees had done everything which they could to obtain possession before the filing of the petition, they had satisfied the requirements of the *Bills of Sale Act*, and were, therefore, entitled to retain the chattels. The trustee appealed.

Argument.

Winslow, Q.C., and *Jeune*, for the trustee:—

The mortgagees had no right under the deed to take possession on the 1st of April, as the mortgagor had made no default; they were mere trespassers. And, moreover, they did not take a sufficient possession to satisfy the *Bills of Sale Act*.

To satisfy the Act an actual possession must have been obtained. The evidence only shews that the mortgagees did all they could to obtain possession. That is enough for the purposes of the

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reputed ownership clause, but it will not satisfy the requirements of the *Bills of Sale Act: Ex parte Lewis* (1); *Ex parte Jay* (2). The evidence shews that before 11.30 nothing had been done except the posting up of the printed bills. But, unless actual possession has been in fact taken, the posting up of a notice that the mortgagee has taken possession is of no use. There was no right to take possession until default by the mortgagor.

[MELLISH, L.J.:—If a mortgagee has by the terms of his deed a right to take possession, it may be that by construction of law his taking possession of one of the things comprised in the deed will amount to possession of all. But if he is a wrong-doer, will the law extend his possession by construction beyond his actual physical possession?]

De Gex, Q.C., and *Romer*, for the mortgagees:—

The evidence shews that before 11.30 actual possession had been obtained of some, at least, of the chattels comprised in the deed. *Hawksley* was in the manager's office before that time, and had demanded possession. It must be taken that he was at any rate in possession of the office furniture, and the possession of that amounted to a constructive possession of all the chattels comprised in the mortgage.

[MELLISH, L.J.:—There had been no default on the part of the mortgagor. He was entitled to keep the mortgagees out. If actual possession is taken, even wrongfully, it may prevent the application of the *Bills of Sale Act*. But, in determining whether a sufficient possession was taken, much more unequivocal acts must be proved when the person who is said to have taken possession is a mere wrong-doer than when he has a right under his contract to take possession.]

Any creditor who had come to the works would have seen, first of all, the printed notice on the gate, and then he would have seen a strange man in the manager's office in apparent possession of the furniture there.

[JAMES, L.J.:—How could the creditor know who *Hawksley* was?]

(1) Law Rep. 6 Ch. 626. (2) Law Rep. 9 Ch. 697.

The printed bills gave sufficient notoriety to the possession.

[MELLISH, L.J.:—There must be an actual possession before you can say whether it is merely formal. Here there was not an actual possession. A man who is not entitled to take possession can obtain possession only of that which he actually lays hold of.]

It is not necessary actually to lay hold of anything: *Furber* v. *Finlayson* (1).

[MELLISH, L.J.:—That case seems to be opposed to the current of authority.]

To take actual physical possession of large works like these you must have an army of men. *Ancona* v. *Rogers* (2) differs from the present case, because there the mortgagee did not obtain any possession at all.

[MELLISH, L.J.:—He did all he could.]

The spirit of the Act, not the mere letter, must be regarded: *Gough* v. *Everard* (3). In *Ex parte Jay* (4) some of the property comprised in the bill of sale was still in the house of the grantors when the act of bankruptcy was committed. Some of the articles had been placed by the grantee in vans ready for removal, but the vans were still in the grantors' garden. Nevertheless it was held that the grantee had taken sufficient possession. The object of the Act is to prevent fictitious credit. In *Ex parte Lewis* (5) the main point was that the mortgagee had not advertised the sale as being made by him. We have supplied that defect by our printed notices.

[JAMES, L.J.:—In *Ex parte Lewis* the question was whether the actual possession was a real or a sham possession. Here the question is whether there was any actual possession.]

In *Emanuel* v. *Bridger* (6) the importance of advertising was recognised.

[MELLISH, L.J.:—There a man had been put into possession by the mortgagee, and where that has been done the advertisement of a sale by the mortgagee may be an important matter.]

(1) 24 W. R. 370.
(2) 1 Ex. D. 285.
(3) 2 H. & C. 1, 8.
(4) Law Rep. 9 Ch. 697.
(5) Ibid. 6 Ch. 626.
(6) Ibid. 9 Q. B. 286.

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The possession was only concurrent there, and in the present case there was, at any rate, concurrent possession. Any one who had gone to the manager's office after 10.50 would have been at once apprised that the property did not belong to *Henley*. The question whether actual possession was taken must be determined in the same way, whether the mortgagee was or was not entitled to take possession.

Judgment.

JAMES, L.J.:—

The language of the mortgage deed puts the matter beyond all question, because it is quite clear that what the mortgagees did was, at the time, absolutely illegal, and that illegal act could give them no right at all, because they did not get actual possession of anything. If a man walks into my house without any legal right, he does not thereby get possession of any piece of furniture in my house; and if he walks into my manufactory he does not thereby acquire any right to the goods there. This renders it unnecessary for us to express any opinion as to what would amount to actual possession. Where a man has legally obtained actual possession of a house, probably to some extent that might be deemed to be actual possession of the goods in the house. Under the *Bills of Sale Act* it is quite clear that there must be an actual possession, and that not of a merely formal character. Here there was not any actual possession; there was only an attempt to get possession, an illegal attempt which failed.

MELLISH, L.J.:—

I am of the same opinion.

BAGGALLAY, L.J.:—

I agree.

Solicitors for Trustee: *Gedge, Kirby, & Millett.*
Solicitors for Mortgagees: *Hollams, Son, & Coward.*

In re SNELL (A SOLICITOR).

C. A.
1876
M. R.
Nov. 6, 13.
1877
C. A.
March 16, 17, 19, 24; *April* 21.

Solicitor—Bill of Costs—Retainer without special Instructions—Journey to collect Information and conduct Negotiations—Solicitor of Public Company.

A solicitor had a retainer to act generally for a company, and also a special retainer to conduct a Chancery suit on behalf of the company. Being employed by another client to go to *America*, he collected information on behalf of the company in furtherance of their suit, but without special instructions from the company to do so. On his return to *England* he reported to the company what he had done, and they made use of the information he had obtained.

He afterwards took three journeys to *Paris* to conduct negotiations for a compromise of the same suit, without instructions from the company, but with the knowledge of some of the directors, and on two of them he was accompanied by the chairman:—

Held, by the Court of Appeal (reversing the decision of the Master of the Rolls), that, under the special circumstances of the case, the solicitor was entitled to charge the company for his professional services in *America*, and also for his professional services and expenses on his journeys to *Paris*.

Observations on the rule that a solicitor must not undertake journeys on behalf of his client without special instructions.

/0 QBD 21

Statement.

THE questions in dispute in this case arose upon a summons to review the taxation of the bill of costs of Mr. *F. W. Snell*, a solicitor, for business done for the *Flagstaff Silver Mining Company of Utah.*

The facts were as follows: The company was incorporated on the 28th of November, 1871. Its principal object, as stated in the memorandum of association was to acquire and develop a certain freehold mining property situate in *Salt Lake County*, in the territory of *Utah*, in the *United States*, and known as the *Flagstaff Claim.* The property was purchased shortly after the incorporation of the company. At a meeting of the shareholders, held on the 24th of February, 1874, the then directors were removed and a new board was appointed; and at a meeting of the new board, held on the 6th of March in the same year, the then solicitors of the company were discharged, and Mr. *Snell* was appointed in their place. On the 21st of April he was directed by the board to commence legal proceedings, in the name of the company, against the former directors, in accordance with a resolution that

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had been passed at a previous meeting of the shareholders. A bill was accordingly prepared, and was filed in the month of November; to this bill the former directors and one *E. Davis* were Defendants, and the grounds of complaint alleged against them were as follows: That shortly before the incorporation of the company, *Davis*, who was then residing in *America*, formed the design of acquiring the ownership of certain mines in the *Utah* district, and of selling them at large profits to joint stock companies in *England*, his scheme being to bring them out in succession, and, by arranging for the payment of large dividends by the companies first formed, to induce the public to subscribe readily for those to be subsequently brought out; that with this view he, in the month of September, 1871, entered into arrangements with the *Salt Lake Mining Company* for the purchase of the *Flagstaff Mine* for £60,000, and shortly afterwards caused a contract to be entered into between the *Salt Lake Company* and one *Horace Nelson Wilkins*, as trustee for the intended *Flagstaff Company*, for the sale of the mine for £300,000, to be paid as to £100,000 in cash, and as to the balance in fully paid-up shares, it being arranged between *Davis* and the *Salt Lake Company* that, though the contract was expressed to be entered into by that company, he was to receive the difference between the £60,000, at which he had agreed to purchase the mine from them, and the price at which it was to be sold to the new company; that the *Flagstaff Company* was promoted by *Davis* with the aid of the original directors, and that by the articles of association the contract was confirmed and declared binding upon the company; that from the month of February, 1871, until August, 1873, dividends of large amount were declared monthly, and paid upon the shares in the *Flagstaff Mine*, by means of which *Davis* not only realized large profits in respect of the shares appropriated to him as part of the purchase-money, but was enabled to form two other companies called the *Last Chance Company* and the *Tecoma Silver Mining Company*; that the dividends of the *Flagstaff Company* were for the most part paid out of capital and out of moneys borrowed from the *Last Chance* and *Tecoma Companies*; and that the directors of the *Flagstaff Company*, several of whom were also directors of the other companies, had wilfully or negligently sacrificed the inte-

rests of their shareholders. The bill prayed, amongst other relief, that both *Davis* and the directors might make good to the *Flagstaff Company* the amount of profits realized by *Davis* from the before-mentioned transactions, and that the directors might also make good to the company all loss and damage which the company had sustained by the breaches of trust committed by him, and by their improper payments of dividends.

The counsel by whom the draft of the bill had been prepared advised that information should be obtained from *America* as to several matters indicated by him, and at the first meeting of the new board after their appointment it was resolved to investigate not only the financial position of the company, the agreements with *Davis*, and the acts of the late directors, but also to inquire into the *Utah* management and the accounts rendered by it.

When the draft of the bill had been prepared it was submitted to the directors, but in consequence of certain proposals having been made by *Davis* for a compromise of the claims against him, the directors resolved, on the 24th of July, 1874, that the filing of the bill should be postponed.

Shortly after this, on the 11th of August, 1874, Mr. *Snell* went to *Utah*, and was absent from *England* until the end of October. The visit to *America* was made under the following circumstances: About the same time that the board of directors had been changed by the shareholders of the *Flagstaff Company* and Mr. *Snell* had been appointed the solicitor of that company, the shareholders in the *Tecoma Company* had also elected a new board of directors and had appointed Mr. *Snell* their solicitor, and it was in his character of solicitor to the *Tecoma Company*, but instructed also on behalf of at least one other company originated by *Davis*, that Mr. *Snell* went to *America*. The statement of the services alleged to have been rendered by Mr. *Snell* to the *Flagstaff Company* are thus given in his affidavit sworn on the 7th of June, 1876:—

"In course of the preparation of the bill in Chancery it became necessary, and I was advised by counsel, to obtain from *America* information as to the position of the company, as to the value of the mine, as to the debts alleged to be due, and as to the amount of ore returned from the mine previous to the same being formed into a company as well as the present time; and as I was proceeding to

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America on other business, discussions from time to time were had with the directors with reference to my journey and the information to be obtained, and the advisability of my seeing Mr. *John Nelson*, and Mr. *Patrick*, the gentleman who had a power of attorney from the company, and who also held possession of the mine on behalf of Mr. *Davis*, under an agreement entered into with him by the old directors, and which agreement it was thought advisable, if possible, to set aside; and getting from Mr. *Patrick* the present position of the company, and also of my seeing the company's solicitors at *Salt Lake City*, and ascertaining what steps could be taken to enforce the rights of the company against the vendors and others in the Courts in *America;* and accordingly the filing of the bill of complaint in the Court here was delayed until I should return and had obtained the information aforesaid. After my arrival in the *Salt Lake City* I went to the office of the *Flagstaff Company* and there saw Mr. *Patrick* and obtained information from him, and I also inspected the books of the company, particularly with reference to the amount of ore which had been raised and the amount of bullion smelted and sold, and the expense of raising and smelting the same, and obtained information generally as to the amounts of debts and liabilities of the company; and with the said Mr. *Patrick* I attended several times on Messrs. *Baskin & Woolfe*, the solicitors of the company, in *Salt Lake City*, and discussed with them the numerous actions which were brought against the company, and the necessity of a commission being sent to *England* to take testimony, and I obtained some valuable information which I required, and also respecting the claims made against the company by Captain *Forbes* and Mr. *Maxwell*. I visited two or three times the furnaces of the company at *Sandy*, about thirteen miles from *Salt Lake City*, and also visited the mine and went all through it, and inspected particularly the mode of working the same, and acted in numerous matters on behalf of the company and in their interests, so as to be in a position, on my return to *England*, to inform the directors of the true state of affairs in *America*, and to advise them the best course to adopt.

"I also made numerous inquiries as to the law of the *United States* respecting foreign corporations, and the probability of any

relief being obtainable in the Courts of *Utah*, and consulted with several solicitors on the matter.

"In the course of my investigation I found that the greater part of the ore raised at the mine and smelted at the furnaces, and converted into base bullion, was then sold to the *Omaha Smelting and Refinery Company* at *Omaha*, and that probably the books of the company there would shew the amount of bullion belonging to the company which had passed through their hands, and I accordingly visited *Omaha*, staying there three or four days inspecting the books of the *Refinery Company*, and obtaining extracts therefrom, and I had no other business to transact at *Omaha*.

"On receiving information from Mr. *Patrick* that Mr. *Davis* had left *Paris* for *New York* in consequence of his hearing that I was in *America*, and Mr. *Patrick* having expressed a wish that I should meet Mr. *Davis* at *New York*, with a view of coming to some settlement with him, I accordingly for some days delayed my journey home to *England* to enable me to see Mr. *Davis*. I did see him with Mr. *Patrick*, with a view to a settlement with the company, and Mr. *Davis* said he would go to *Salt Lake City*, and on his return to *Europe* he would let me know and would then see me, as he was anxious to come to some arrangement.

"I had no other business whatever which required my presence at the furnaces of the company at *Sandy*, or at the mines, or at *Omaha*, but I transacted the business at those places to the best of my ability for the purpose of obtaining information which I considered would be, and I have no doubt has been, of material benefit to the company."

On the other hand, Mr. *Tweed*, the chairman of the company, in his affidavit of the 5th of July, 1876, stated as follows:—

"I attended most of the board meetings of the directors, and was fully cognisant of all matters in connection with the company, and no directions or instructions were given at any board meeting to Mr. *Snell*, the then solicitor of the company, to go to *America* on the company's business, nor were any such directions given to him by myself individually, nor, to the best of my knowledge and belief, by the other directors, nor were any such directions for-

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warded to him in *America;* and I was not aware, until after his return, that he had even been to the company's works, when, in consequence of a communication made by him through Mr. *Mackenzie*, one of the directors, that he had what he termed valuable information respecting the company's affairs in *America* to impart, the board requested his attendance at another board meeting to impart the same; but I am not aware that the company has benefited in any way whatever from any information derived from his journey to that country."

Sir *Leopold Heath*, another director, in his affidavit, made substantially the same statement.

Mr. *Snell* made a further affidavit on the 13th of July, in which he reiterated the statements contained in his affidavits of the 7th of June, and on the 20th of July he was cross-examined on both his affidavits, and then stated as follows:—

"When I left *England* I did intend to visit *Flagstaff Mine* and works, to the knowledge of the directors of that company, and acting under the advice of counsel that it was most important that evidence should be obtained from *Utah* for the purposes of the suit, and also as to the general business of the company. It was not mentioned at a board meeting, because some members of the board did not wish it to be known to the Defendants in the suit, who would be likely to hear of it from the officers of the company. The chairman, Mr. *Tweed*, with whom I was always in most confidential communication, was aware of it. He did not instruct me to go; I received no official instructions; I acted in my capacity as solicitor of the company, and did what I considered for their interest. It was publicly stated by me at a meeting of the shareholders, at which the directors were present, that I was going to *America*. I do not think I stated on what business I was going, but the directors perfectly well knew that I was going on business connected with *Davis*, the principal Defendant in the suit, who was also connected with the *Tecoma Mine*, and other American speculations."

After this cross-examination Mr. *Tweed* and Sir *Leopold Heath* made further affidavits on the 27th of July, and repeated in substance the statements previously made by them.

Respecting this visit to *America* Mr. *Snell's* bill of costs contained the following item:—

"Aug. 6, 1874. Attending board meeting, on a discussion being raised on my visit to *America*, and on my informing the board that I should leave *London* on the 11th instant, and receiving instructions from them to visit the mines and company's property and make inquiries relative to the working and management thereof in *America*, and especially as to the smelting operations at *Omaha*, and also to inquire into the position of the suits now pending against the company in the American Courts, and ascertain what evidence it would be necessary to adduce on behalf of the company."

In the minute book of the board there was no entry of any such instructions or discussion, and Mr. *Snell* stated in his evidence that this item was not introduced into the bill of costs from any contemporaneous notes in equal detail made by himself, but from concise notes dictated by him to one of his clerks and taken down in short-hand, which guided him in making out the item when he prepared the bill of costs. The original short-hand notes, however, were not produced, as the clerk had left his service. Then followed the following item respecting the services in *America*:—

"Aug. 11 to Oct. 29. Attending at the offices of the company, in *Salt Lake City*, on Mr. *J. N. H. Patrick*, the manager of the company, perusing the accounts of the company and going fully into the same, and obtaining information as to the affairs of the company and the mode in which the business was carried on, and numerous attendances on Mr. *Patrick*, Mr. *Barber*, and Mr. *Walker*, as to the amount of ore raised and sold from the mine and the debts and liabilities of the company; several attendances at the furnaces at *Sandy*, inspecting the books there and the mine, and going through the same, and comparing the workings with the plans, and obtaining explanations from Mr. *Collins* and other persons as to the value of the mine, and afterwards attendances on Mr. *Patrick*, going fully with him into the charges made in the bill, which was already prepared and printed, and arranging to meet Mr. *Davis*, who, he informed me, was going to *America* for that purpose; and taking journey to *Omaha*, where the principal

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quantity of bullion obtained from the mine was sold; inspecting the books of the *Omaha Smelting Company*, and taking extracts therefrom shewing the quantity of bullion received and paid for since the company was formed; and attending with Mr. *Patrick* or Mr. *Davis* in *New York;* discussing the position of matters fully with him at several interviews, and ultimately Mr. *Davis* said he was going to *Salt Lake City* and would look into matters, and on his return to *Paris* he would be glad to see me and listen to any proposition for a settlement, but he would have nothing to do with Mr. Serjeant *Sleigh*, Mr. *Murray*, or any other member of the committee; and attendances at *Salt Lake City* on Messrs. *Baskin & Woolfe*, the company's legal advisers there; conferring with them as to the action pending against the company, and giving them particulars, and on its being decided to issue a commission to *London* to examine witnesses thereon, and giving them names to whom to direct the commission—£150."

Mr. *Snell* arrived at *Liverpool* on the morning of the 28th of October, and telegraphed the fact of his arrival to his clerk in *London*. Mr. *Mackenzie*, who was one of the directors of the *Flagstaff Company*, and also a director of the *Tecoma Company*, called at Mr. *Snell's* offices on his way to a board meeting of the former company, and having heard there of Mr. *Snell's* arrival at *Liverpool*, informed his brother directors in the *Flagstaff Company* of the fact, and they at once passed a resolution to the effect "that Mr. *Snell* should be asked to attend the board which had been appointed to be held on the 31st, to give such information as he may be able as to the mine, &c." Mr. *Snell* attended the board meeting of the 31st, in accordance with the request so made to him, and the directors' minute-book contains the following items as to what took place upon that occasion:—

"Mr. *Snell* attended the board by request, and gave information as to his journey to *Salt Lake* and his interview with Messrs. *Davis* and *Patrick*."

"Resolved, That the bill in Chancery as prepared be at once filed, but that a letter be sent with the bill to the Defendants to the effect that the directors are still desirous to effect a compromise."

Statement.

Accordingly, on the 6th of November the bill was filed, having been re-settled subsequently to Mr. *Snell's* return, and as alleged by him with reference to the information obtained by him in *America*. Sir *Leopold Heath* appeared to have taken an active part in such re-settlement.

The other items which were disputed related to three journeys which Mr. *Snell* made to *Paris* on the 8th and 25th of January, and the 25th of March, 1875. These journeys were undertaken for the purpose of settling the terms of a compromise with Mr. *Davis*. The evidence as to the circumstances under which these journeys were made was contradictory. No resolution was passed by the board of directors, nor were any written instructions given directing Mr. *Snell* to undertake any of these journeys, but they were undertaken with the knowledge of some of the directors, and on the last two journeys Mr. *Snell* was accompanied by Mr. *Tweed*, the chairman of the company. Mr. *Tweed*, however, stated in his evidence that Mr. *Snell* undertook the journeys on account of the *Tecoma Company*, and not of the *Flagstaff Company*, and that the interest of the *Flagstaff Company* was represented by himself, and not by Mr. *Snell*. The account of the matter given by Mr. *Snell* in his first affidavit was as follows:—

"Having informed the board of all my proceedings in *America*, and of my interview with Mr. *Davis*, and of his having intimated to me that when he returned to *Europe* he would like to see me to endeavour to come to some settlement, it was understood that immediately I received any such intimation I should go to *Paris* and see Mr. *Davis*, and accordingly having received such intimation the day before Christmas Day, 1874, I, at the greatest inconvenience, went to *Paris* on the evening of Christmas Day and met Mr. *Davis*, and there discussed fully the position of matters with him, and also as to what terms could be arranged with regard to the old directors, and on my return from *Paris* I communicated the fact of my journey to some of the directors, although I may not have done so at a board meeting, in consequence of the board being then divided into two parties, and I was instructed to do everything I could to bring about a satisfactory settlement, bearing in mind the difficulties the company was in with reference to its financial affairs.

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"In consequence of these instructions I found it necessary to have an interview with Mr. *Davis*, and accordingly I proceeded to *Paris* and had an interview with him on the 8th of January, 1875, and again discussed with him fully the position of matters and the difficulty of getting the old directors to do anything, and my interview with their legal advisers, and ultimately arranging certain terms with him which I thought could be carried out, and he promised to communicate with the old directors, and if they refused to carry out the same he would arrange terms with the company without reference to them; and on my hearing from him I arranged for an interview between himself and the chairman of the company and myself, so as to finally settle the terms, and I positively believe that these interviews were the means of the ultimate settlement of the suit, whereby the company obtained the funds so much needed, and had not these funds been then obtained the company would have been wound up on Captain *Forbes'* petition, which had then been presented."

The Taxing Master allowed the sum of £100 for the services done for the company during the journey to *America*, and he also allowed the expenses of the three journeys to *Paris*, together with five guineas a day during the time which they occupied.

The company took out a summons to review this taxation, objecting to the decision of the Taxing Master on these items. The summons was heard before the Master of the Rolls on the 6th of November, 1876.

Chitty, Q.C., and *Bush*, for the company.

Cookson, Q.C., and *Grosvenor Woods*, for Mr. *Snell*.

Judgment, M.R. JESSEL, M.R.:—

I have no hesitation in disallowing the first item. A solicitor has no right to take special journeys or to go to foreign countries at the expense of his client without specific instructions: nothing is better settled: otherwise the unfortunate client, in giving a retainer to a solicitor, would thereby authorize him to travel all over the world at his expense. If this question were now to be decided for the first time, I should so decide it, but it has been settled as

long as I have known anything about the taxation of solicitors' bills of costs.

But then it is said that if a solicitor is instructed to go to the *United States of America* to visit one of the most distant portions of the territory, the territory of *Utah*, he is entitled to go there at the expense and costs of the client who so instructs him, and, when there, to transact any business he pleases on behalf of any other client whose general solicitor he happens to be, at any costs he thinks fit, without any communication with that other client, and without receiving any instructions from him; and that when he comes home, merely because he tells the client that he has obtained such information, he is entitled to charge for it. I entirely dissent from that proposition. The same principle applies to a solicitor doing business for the client in this distant portion of the world as to his going there; on account of the enormous expense —the extraordinary and unusual expense—to which the solicitor is putting the client, and which his general retainer does not cover, he must have some special instructions for the purpose. And indeed it appears to me that this was the view of the Taxing Master, and that I am not differing from him in law in the slightest degree. The difference is rather one of fact. He chose on the evidence to disbelieve the statement of the directors, which he treated as incredible, that they did not know that Mr. *Snell* was visiting the mines or doing any business for the company. Now, their credibility was not shaken in any shape or way that I have heard, for there is no contradiction by Mr. *Snell* or by anybody else. I have no reason whatever to disbelieve the directors. To my mind, the statement made by Mr. *Snell* appears incredible in itself. It appears to me that the sole ground on which the Taxing Master acted, namely, that the statement of the directors was so incredible that, even in the absence of contradiction, he thought they must have sanctioned Mr. *Snell's* proceedings, entirely fails. Consequently, in my opinion, the solicitor having done the business without the knowledge of his clients, this item must be disallowed. The business required special instructions.

This alone would be sufficient to dispose of the item, but there is another ground on which I should disallow it. A solicitor's bill when brought here for taxation is bound to disclose matters in

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sufficient detail to enable a person ordinarily acquainted with the business to tax it. Now, in the case of ordinary items, that is done in the greatest detail. Indeed, if there is one fault rather than another to be found with an ordinary solicitor's bill it is that there is too much detail; but, on the other hand, nothing can be better established than that it will not do for a solicitor to put a whole mass of business together and to charge a lump sum, so that no one can tell whether a proper allowance can be made for it or not, or whether he has overcharged or not. The thing requires dissection; particulars and details must be furnished, and it is not until you get them that you can find out whether he has made a proper charge or not. In this particular instance Mr. *Snell* has proceeded upon an item which it is only necessary to read to see that it is not an item which can properly be allowed in a bill of costs. The item is a single item, and although it is rather long I can hardly make my judgment intelligible without reading it. [His Lordship read the item dated August 11 to October 29.] Now the item disallows itself, so to speak. It is not possible to make out what it is worth. It is obvious that this is not the proper mode of making out a bill of costs.

The next observation which occurs to me upon this item is this, that although it looks as if the whole time were occupied in the company's business, it appears to me upon the evidence that between the 11th of August and the 29th of October Mr. *Snell* was not employed during the whole of that period in the company's business, but only for a part of it. Without meaning to impute any dishonest intention to Mr. *Snell*, I am satisfied that this is not a *bonâ fide* charge fairly made against the company; but that, having been over there for the purpose of the business of other companies, he thought it as well, if he could, to do some business for this company, and so make some charge for it. I think the charge should be disallowed by the Taxing Master, and I shall so direct.

[As to the second item, namely, the costs of the journeys to *Paris*, his Lordship held that it ought not to have been allowed by the Taxing Master in the face of *Tweed's* uncontradicted statement. His Lordship then continued:—] There is another ground on which this item should be disallowed, and it is this: Where

the client's special instructions are required, so that the general retainer of the solicitor does not cover the work done, and the solicitor swears to the special instructions, which were verbal only, and the client denies them, and there is no further evidence, then, according to the rules laid down by my predecessor, and constantly acted upon during the whole course of his judicial career, the solicitor cannot ask the Court to establish the case against the client, it being simply oath against oath, and nothing more. It is the duty of the solicitor to take instructions in writing, and if he chooses to neglect this duty and take a special journey without instructions in writing, he must take the consequences.

Then there is a third ground on which I decide this against Mr. *Snell*, and it is this: Mr. *Snell* had the ordinary retainer as solicitor of the company, and he had a special retainer to conduct the Chancery suit, and that is all. He had no special instructions to go to *Paris*, either on account of the suit or anything else. That was admitted. That being so, he says he went to *Paris* with a view to bring about the compromise of this Chancery suit. Now a solicitor has no right, under the general retainer of a solicitor, to conduct a Chancery suit or to make journeys abroad. As a general rule he has no right even to make journeys in *England*, and therefore it is impossible for Mr. *Snell* to say that either without the previous authority or the subsequent sanction of the company to his taking this journey he has a right to charge the company merely because he had the general retainer to conduct a Chancery suit. I should really not only be impugning a series of decisions by which I am bound, which, no doubt, have generally been applied to journeys taken in *England*, and to country solicitors coming to town to conduct a suit here—I suppose the same rule would apply to a solicitor going from town to the assizes—but I should be going further, because where the journey is out of the jurisdiction it cannot be pretended that the retainer to conduct business as solicitor of the High Court of Chancery, which was all Mr. *Snell* was in this case, could authorize him to act for a person abroad without special authority and out of the jurisdiction. In my opinion I should be doing the greatest possible mischief if I were either to contravene the rule or to add to it, because a solicitor, when retained, has a very large authority

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already. If I were to hold that the mere retainer of a solicitor to conduct a Chancery suit gave him an authority to compromise it abroad or to take journeys to *America* or to *France*, as this gentleman seems to have done, without special authority, where would the liability of a client end? No man in his senses would give a retainer again: he would say, "No, I must restrict you from doing more than attending to this matter in the Courts," to the great detriment, in many cases, of the client. It appears to me it would be a very bad extension of the rule to assume that the general authority of the solicitor extended to anything of the sort that has been suggested. Therefore I shall decide this case on the general rule, without saying that there may not be an exception—as there are exceptions to all rules; for it may be possible to impute some subsequent sanction to the client. If a client, for instance, allowed his solicitor to go to *Paris* to compromise a suit, and when he came back to *London* he told him he had been to *Paris* and made the compromise, and made over to the client £3000, I should then say that the client had sanctioned the journey: I should feel under no difficulty in that case in saying that there was a subsequent sanction. But this is a case in which, as it appears to me, there was neither a prior nor a subsequent sanction. As I said before, I am not even satisfied upon the merits that he did anything for the company, or that he went on the company's business, and I shall therefore disallow this item also.

C. A. From this decision Mr. *Snell* appealed. The appeal came on to be heard on the 16th of March, 1877.

Argument. *Cookson*, Q.C., and *Grosvenor Woods*, for the Appellant:—

We admit the principles laid down by the Master of the Rolls, but those principles have no application to the present case. In the first place, with respect to the journey to *America*, Mr. *Snell* has made no charge for the expense of the journey there and back, because he undertook the journey on the business of another company. But being at that distance from *England*, and having the opportunity of obtaining important information and otherwise doing great service to the *Flagstaff Mining Company*, he spent a considerable amount of time and trouble in doing so. He would

have been inexcusable if he had not done so. If a solicitor, who is travelling for pleasure at a distance from home, has the opportunity of collecting evidence or doing other business for his client, although not specially sent for that purpose, there is no rule against his charging for it. In the present case, although Mr. *Snell* had no special retainer from the company to go to *America*, yet it is clear from the evidence that the directors knew that he was going there, and expected him to gain information which would assist them in their suit in *Utah*. Moreover, as soon as he returned they sent for him to hear a report of his proceedings, and made use of the information which he had collected in the prosecution of the suit. If the information had not turned out to be useful, or if some of the services performed by Mr. *Snell* had not been strictly professional, it would have made no difference: *Waring* v. *Williams* (1). The Master of the Rolls considered that the form in which the charge for work done in *America* was made was irregular, as the details were not given at length; but that objection is now too late. If it had been taken before the Taxing Master, Mr. *Snell* would have had the opportunity of amending the charge and adding the details.

With respect to the journeys to *Paris*, the case is still clearer: for although no formal resolution was passed by the board, several of the directors, including the chairman, who usually acts in such matters for the board, sanctioned them, and the company had the advantage of what was done.

Chitty, Q.C., and *Bush*, for the *Flagstaff Mining Company*:—

With respect to the journey to *Utah*, it is not pretended by Mr. *Snell* that he had any special retainer to transact any business there for the company. He states, indeed, that the directors were informed by him at the meeting of the 6th of August of his intention to go there, and that they then gave him instruction to obtain information about their mine; but there is no entry in the minute-book of any such instructions, and the statement only rests on Mr. *Snell's* memory, and is contradicted by the chairman. The general rule is, that a solicitor has no right to charge his client with the expense of journeys without special instructions, even in

(1) 2 Beav. 1.

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England; and that applies with greater force to journeys in foreign countries: *Re Bevan* (1). And this rule ought to be most strictly kept to in the case of public companies, otherwise the greatest irregularities would take place. In the present case the company had a solicitor at *Utah*, who could have obtained for them all the information which they required; Mr. *Snell's* services there were quite unnecessary. There is no proof that the company on Mr. *Snell's* return made use of the information which Mr. *Snell* had procured. The evidence of what actually took place on his return to *England* is very contradictory, and the onus is on him to shew that the company adopted and profited by his services. We also object to the form in which the charge is made, the work of more than two months being compressed into one paragraph without giving the details.

As to the journeys to *Paris*, we say that Mr. *Snell* took them on behalf of the *Tecoma Company*, and not of the *Flagstaff Company*. He admits that he had no formal instructions from the board; and what took place between him and the individual directors can give him no power to charge the company. His object being to negotiate a compromise of the suit, he ought to have been especially careful to have a special retainer.

Grosvenor Woods, in reply.

Judgment, C. A.

April 21. BAGGALLAY, L.J., delivered the judgment of the Court (*James*, *Mellish*, and *Baggallay*, L.JJ.). His Lordship, after referring to the circumstances attending the institution of the suit by the company against *Davis*, and reading the passages from Mr. *Snell's* affidavits containing the account of his visit to *America*, continued:—

Now, having regard to the nature of the case made, or attempted to be made, by the bill, it was at the time when Mr. *Snell* left *England* not only possible but in a great degree probable that information could be obtained by his personal inquiries at *Salt Lake City*, and at *Sandy* and *Omaha*, which would prove useful not only as regarded the ultimate frame of the bill, the filing of which had only been temporarily postponed, and the evidence by which it was to be supported, but also as a guide in reference to the

(1) 20 Beav. 146.

then proposed or any other compromise of the contemplated litigation.

It has been urged on the part of Mr. *Snell*, first, that what he did when in *America* was done in pursuance of instructions given to him by the directors before he left *England;* secondly, that it was within his general and special retainer on behalf of the company; and thirdly, that it was adopted and acted upon by the company after his return. Upon the first and third of these propositions there is a conflict of evidence which it is necessary to examine.

[His Lordship then read the passage from the affidavits of Mr. *Snell* and of Mr. *Tweed*, and also the passage from the cross-examination of Mr. *Snell*, set forth above, and referred to the further affidavits of Mr. *Snell*, and Mr. *Tweed* and Sir *Leopold Heath*, and continued:—]

Now, at first sight these conflicting statements appear to be irreconcilable, and whilst the Taxing Master has given credit to the statement of Mr. *Snell*, the Master of the Rolls has rejected Mr. *Snell's* testimony, and adopted in its entirety the statement of the directors. We are unable to concur in either of these views. It appears to us that both statements are more or less exaggerated, not perhaps intentionally, but by reason of the same circumstances having been regarded from different points of view by the two parties.

Having regard to the fact that the new board of directors had been brought into power, and that Mr. *Snell* had been appointed the solicitor of the company for the express purpose to which reference has already been made, and that in furtherance of such purpose a bill had been prepared, the filing of which was only delayed in consequence of a proposal by *Davis* for a compromise, it appears to us almost incredible that the directors should at such a time have viewed with indifference the visit of their solicitor to *America*, and his possible prolonged stay there, during which time they would be deprived of the benefit of that advice and assistance to afford which he had been expressly appointed; and not only this, but that they should have failed to perceive the important information which he might possibly, if not probably, obtain during his visit. That they were cognisant of his intended visit to *America* is not denied, that they eagerly sought on his return for

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the information which he had obtained, and at once availed themselves of it, will appear presently, and if they were so blind as not to be able to perceive the advantage which might be obtained from his visit, or so careless as not to instruct him to obtain it, they could hardly have been fit for the particular duty which they had been appointed to discharge. We are satisfied, upon this conflicting evidence, that though specific instructions were not formally given to Mr. *Snell* as to the course to be pursued by him in *America* with relation to the interests of the *Flagstaff Company*, it was perfectly well understood by the directors, as well as by Mr. *Snell*, that he would, when visiting the localities of the *Flagstaff Mine*, and of its smelting and other works, keep his eyes open and avail himself of any information he could obtain which might aid him in the advice he should tender to the company in the exceptional state of circumstances in which it was placed. There is, however, in Mr. *Snell's* bill of costs an item, under date the 6th of August, 1874, which calls for observation; it is in the following terms:—"Attending board meeting on a discussion being raised on my visit to *America*, and on my informing the board that I should leave *London* on the 11th instant, and receiving instructions from them to visit the mines and company's property, and make inquiries relative to the working and management thereof in *America*, and especially as to the smelting operations at *Omaha*, and also to inquire into the position of the suits now pending against the company in the American Courts, and ascertain what evidence it would be necessary to adduce on behalf of the company."

This item distinctly asserts that instructions were given to Mr. *Snell* at the board meeting of the 6th to make such inquiries in *America* as are alleged to have been actually made by him, and it has been suggested in the course of the argument before us, as it apparently was, and with success, before the Master of the Rolls, that the introduction of this item into the bill, as also of the further items for the services alleged to have been rendered in *America*, were the result of afterthought, and that it was not originally intended by Mr. *Snell* to make any charge in respect of either of these items. Now, it was admitted on behalf of Mr. *Snell* that these items were not introduced into the bill of costs from any contemporaneous notes in equal detail, but from concise

notes taken in short-hand at the time, and which were sufficient to guide, and did guide, him in subsequently making out his detailed bill. We do not think that this explanation is altogether satisfactory, but, having given our best consideration to the case, we have arrived at the conclusion that Mr. *Snell* was led to believe, and did believe, that he had the authority of the directors to make such inquiries as he might deem expedient in *America*, and that he made out his bill of costs accordingly, though he apparently did not press this view of the case either upon the Taxing Master or upon the Master of the Rolls. It is, however, not a little singular that the item in question, under date of the 6th of August, does not appear to have been objected to. Upon the whole, if it were necessary that the giving of specific instructions should be established in order to entitle Mr. *Snell* to make the charge which has been disallowed by the Master of the Rolls, there is not, in our opinion, sufficient evidence that such instructions were given.

How, then, does the matter stand upon the second of the points contended for on Mr. *Snell's* behalf, viz., that what he did in *America* was within his retainers? Now, we substantially agree with the Master of the Rolls in the remarks made by him in the course of his judgment, to the effect that, as a general rule, a solicitor is not justified in taking special journeys, or in going to foreign countries at the expense of his client, without specific instructions; but the present case is one in which the facts to which a general rule is to be applied are of a very special character. Mr. *Snell's* bill of costs contains no charge for the expenses of the journey to or from *Salt Lake City*, and his claim is made in respect of a portion only of the time of his stay in *America;* the charge in question of £100 would represent less than twenty days of the period of upwards of eleven weeks that he was absent from *England*, and the question is, whether he was justified, under all the circumstances of the case, in incurring any expense at all chargeable to the company, in respect of the subject-matter either of his special or general retainer. We think that he was so justified within reasonable and proper limits, and that his clients would have had just reason to complain if on his return he had said to them, "I have been to the neighbourhood of the *Flagstaff*

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and other mines, and of your smelting and refining works, and could have obtained information which, having regard to your intended proceedings against *Davis* and the old directors, would probably be of great value to you, but as I had no special instructions from you, I did not make any inquiries, and I now recommend you either to send me out with proper instructions at a much greater cost, or to direct me to instruct some other person on the spot, who, from want of the special knowledge which I possess, will not be able to prosecute any such inquiries as efficiently as I could." Now, if Mr. *Snell* was justified in incurring any such expense at all, as we think he was, the questions what, under the circumstances, were the proper and reasonable limits, and whether they were exceeded, were for the Taxing Master, with whose discretion in such matters the Court would not be disposed to interfere. If we are right in the view which we have taken of the second point urged on behalf of Mr. *Snell*, it is perhaps immaterial to consider the third, which is, that what was done by Mr. *Snell* was subsequently adopted and acted upon by the directors; though we feel bound to say that we think it was. [His Lordship then referred to the evidence, before stated, of what took place on Mr. *Snell's* arrival in *England*, and to the resolutions passed at the meeting of the board on the 31st of October, 1874, and continued:—]

Having regard to the evidence of Mr. *Mackenzie* and of Mr. *Stratton*, who was elected a director in August, 1874, during Mr. *Snell's* absence, and to the uncontradicted facts in the case, we are satisfied that the board entertained the expectation of obtaining valuable information from Mr. *Snell* on his return, and that with that object, and not in consequence of any representations made by him, they arranged to meet him at the earliest moment after his arrival; and we cannot but think that the memory of those gentlemen who have made affidavits in opposition to Mr. *Snell's* claim is somewhat defective as regards the circumstances which took place in connection with Mr. *Snell's* return from *America*.

Upon the whole, we are of opinion that the view taken by the Taxing Master in this case was a correct application of general principles to the facts of the present case. We think that the services alleged to have been rendered by Mr. *Snell* in *America*,

and which the Taxing Master has found were so rendered, were within his retainers, and that the company was properly charged for the same. We think, also, that, even if they were not originally within his retainers, they were subsequently ratified and confirmed, and that the order of the Master of the Rolls disallowing the item of £100 for professional services rendered between August 11th and October 28th should be discharged, and that such item should be allowed.

It has been urged before us that this item was introduced into the bill of costs in terms that were too general, and that upon this ground it should have been disallowed. If this objection had been taken before the Taxing Master in the first instance, and if it had formed the subject of an objection to his certificate, it might have proved fatal to Mr. *Snell's* claim; but this does not appear to have been the case; the objection, which is purely technical, appears to have been taken before the Master of the Rolls, and if not by the Judge himself, at any rate, then for the first time. Under these circumstances we think that it was taken too late and cannot now prevail.

The other items in Mr. *Snell's* bill of costs, which were allowed by the Taxing Master, but were disallowed by the Master of the Rolls, were in respect of three journeys to *Paris* in the months of January and March, 1875. They differ from the charge in respect of the journey to *America* in the circumstance that the Taxing Master allowed the expenses of the journeys to and from *Paris*.

It is alleged by Mr. *Snell* that these journeys were taken for the purpose of negotiating with *Davis* for a compromise of the suit which had then been commenced, and that it resulted in an agreement for compromise being concluded with him early in the latter month. It is admitted on the part of the company that negotiations were on foot for a compromise before Mr. *Snell* went to *Paris*, that such negotiations were continued during his three several visits to *Paris*, and that the agreement for compromise was signed at the time above mentioned. It is further admitted that Mr. *Snell* was accompanied by the chairman of the company on his two last visits, and that the expenses of the chairman were paid by the company, but it is alleged on the part of the company that the negotiations had reference to the compromise,

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not only of the suit of the company, but of other suits or claims against Mr. *Davis*, including a suit by the *Tecoma Company*, and that Mr. *Snell's* visits, and the negotiations conducted by him, were on behalf of the *Tecoma Company* alone, whilst the negotiations on the part of the *Flagstaff Company* were conducted by the chairman; and in support of this view reliance is placed upon the fact that Mr. *Snell* had taken a previous journey to *Paris* in December on behalf of the *Tecoma Company*, in respect of which he had inserted charges in his bill of costs which were disallowed by the Taxing Master. It appears, however, that Mr. *Snell* reported in detail to the chairman of the *Flagstaff Company* the results of his first visit, and that this led to the subsequent journeys, and Mr. *Snell* swears most distinctly in his cross-examination that, upon the three visits in question he transacted no business whatever except in relation to the *Flagstaff Company*, an assertion which if untrue could have been readily contradicted. It appears to us that all the surrounding unquestioned circumstances are in favour of the view that these journeys were undertaken on behalf of and in the interests of the *Flagstaff Company;* and though it is doubtless true that, as in the case of the journey to *America*, no formal instructions were given to Mr. *Snell* by the board to incur the expense of these journeys, we are of opinion that Mr. *Snell* was under the impression induced by the conduct of at least some of the directors, if not of the board, that he was authorized to make them. We are further of opinion that the business done at *Paris*, whether strictly authorized by instructions or not, was done in furtherance of the interests of the company, though this, of course, would not of itself entitle him to charge for it. But however this may be, we are satisfied, upon a full consideration of all the evidence in the case, conflicting though it doubtless in some respects is, that the directors, after Mr. *Snell's* return from the last visit, adopted and acted upon what he had done.

Under these circumstances we are of opinion that business was transacted by Mr. *Snell* at *Paris* upon the occasion of these three journeys, in respect of which he was entitled to charge the company; and such being the case, we think that the quantum of such charge was for the consideration of the Taxing Master, who, being satisfied that Mr. *Snell's* time was fully occupied in the busi-

ness of the company, has, in our opinion, properly allowed the expenses of the journeys.

The result is that the appeal must be allowed, and the costs of Mr. *Snell* of the hearing before the Master of the Rolls and of the present appeal paid by the company.

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Solicitors: *Torr & Co.; F. W. Snell.*

In re GEORGE (AN INFANT).

C. A. 1877 V.-C. H. *Jan.* 19. C. A. *April* 23.

[1876 G. 152.]

Will—Maintenance of Infant—Legacy on attaining Twenty-one, with Provision for Maintenance in meantime—23 & 24 Vict. c. 145, s. 26.

The 26th section of the 23 & 24 Vict. c. 145, empowering trustees to apply towards the maintenance of an infant the income to which such infant may be entitled in respect of a legacy payable contingently on his attaining twenty-one, does not apply to a case where the infant on attaining twenty-one would not be entitled to interest on his legacy till the time of payment.

A testator declared that his personal estate should be held upon trust out of the annual produce to raise for every daughter who should be under age and unmarried the yearly sum of £50 for their maintenance and education, and to accumulate the surplus income as part of his residuary personal estate, and he bequeathed to each of his daughters a legacy of £4000 if and when they should respectively attain twenty-one or be married, and gave his residuary personal estate to his eldest son :—

Held (reversing the decision of *Hall*, V.C.), that the legacies to the daughters did not carry interest until the time of payment, and that the Court had no power under the 26th section of the 23 & 24 Vict. c. 145 to apply any part of the income of the expectant legacies to the maintenance of the daughters.

19 Ch D 36

Statement.

THOMAS GEORGE, by his will, dated the 27th of November, 1861, after appointing two persons executors and trustees thereof, gave to his trustees all his personal estate, except as therein mentioned, to be invested and held on the following trusts, that is to say, upon trust, after payment of his debts, testamentary and funeral expenses, and certain annuities, to raise out of the annual produce thereof, for each son of his, other than his eldest son *T. J. George*, who should be under the age of twenty-one years, and for any daughter of his who should be under the age of twenty-one years and unmarried, the yearly sum of £50, and to

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pay the same to his wife during her widowhood for the maintenance and education of such children respectively, and after the death or second marriage of his said wife, to apply the same in or towards the maintenance and education of such children respectively, in such manner as his said trustees should in their discretion think fit, and upon further trust to accumulate the residue (if any) of such annual produce, in order that it might form part of the capital of his general personal estate; and, subject to the application of the whole or a sufficient part of the annual produce of his personal estate in and towards the payment of the annuities and yearly sum of money aforesaid, the testator declared that his personal estate should be held upon trust to pay thereout the several legacies thereinafter given, that is to say (among other legacies), to each of his daughters, *Emily*, *Sarah*, and *Cecile M. M. George*, a legacy of £4000 if and when they should respectively attain the age of twenty-one years or be married, which should first happen, and to his younger son, *H. B. George*, a legacy of £4000 if and when he should attain the age of twenty-one years. And the testator gave the residue of his personal estate to his eldest son, *T. J. George*, if he should attain the age of twenty-one years, which event happened.

The testator died on the 17th of January, 1868. He left four children, of whom the eldest and youngest were sons. Two children had attained the age of twenty-one years; the two youngest were infants.

By an order made in the matter of *Cecile M. M. George*, one of the infants, dated the 8th of August, 1876, Vice-Chancellor *Hall* ordered that the trustees should be at liberty to transfer into Court to the credit of this matter "the contingent legacy account," £3092 15*s.* 6*d.* consuls, and certain sums of cash making up the legacy of £4000, and that out of the dividends to accrue on the fund the sum of £50 per annum be paid during the minority of the said *Cecile M. M. George*, or until further order, to the trustees, towards the maintenance and education of the said infant over and beyond the sum of £50 per annum applicable for that purpose under the testator's will, and that after payment of the costs of the application the ultimate remainder should be invested.

The residuary legatee, *T. J. George*, presented a petition praying

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that the order for payment of the additional £50 a year, and investment of the surplus, might be discharged, and that only the £50 per annum, applicable under the will for the maintenance of the infant, might be paid to the trustees, and that the residue of the dividends might be paid to the Petitioner.

The petition was heard before Vice-Chancellor *Hall* on the 19th of January, 1877.

Argument.

W. Pearson, Q.C., and *Staffurth*, for the Petitioner, contended that, the legacy being given to the infant contingently on her attaining twenty-one, and the sum of £50 being set apart by the testator for her maintenance, the income beyond the annual allowance of the £50 belonged to the residuary legatee.

Cozens-Hardy, for the infant, relied upon the 23 & 24 Vict. c. 145, s. 26 (1).

Judgment, V.-C. H.

HALL, V.C.:—

I think that the order made in this case was a right order having regard to Lord *Cranworth's Act*. I do not construe that Act in the same way as Mr. *Pearson* construes it, as only authorizing the application by trustees of income, to which income (considered as accruing and set apart and capitalized) the infant would become entitled on attaining the age of twenty-one years. The view taken by the Master of the Rolls in *In re Cotton* (2) is, I am satisfied, the correct one. As I understand his judgment, he did not mean that

(1) 23 & 24 Vict. c. 145, s. 26: "In all cases where any property is held by trustees in trust for an infant, either absolutely or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age, it shall be lawful for such trustees at their sole discretion to pay to the guardians (if any) of such infant, or otherwise to apply for or towards the maintenance or education of such infant, the whole or any part of the income to which such infant may be entitled in respect of such property, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education or not, and such trustees shall accumulate all the residue of such income by way of compound interest by investing the same and the resulting income thereof from time to time in proper securities for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen."

(2) 1 Ch. D. 232.

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the statute applied only to cases in which the infant would be entitled to the income if he attained twenty-one, although in the particular case before him the infant on attaining twenty-one would have had the income as well as the share of residue. The case he referred to was a case in which the legacy did not carry interest—but for the rule that although in the case of a contingent legacy to a stranger the legatee does not get interest, yet in the case of a child the legatee does get interest. I take that to have been the rule from a much earlier period than the decision of Lord *Hardwicke* in *Incledon* v. *Northcote* (1), in which case he says that, in the case of a stranger, whether the legacy is given absolutely or not, until he reaches the age of twenty-one years he can have no interest in the meantime; but where it is given to children the Court will direct interest for their portions immediately. In *Brown* v. *Temperley* (2) there was a trust to raise out of residue a sum of £15,000 for such of the testator's children as attained twenty-one, and it was held that the children were entitled to interest out of the residue. In *Chambers* v. *Goldwin* (3), which the Master of the Rolls cited in *In re Cotton* (4), there was a period of time during which there was no provision; and the argument there was that, there being only a provision for a certain period of time, there was a necessary inference that the ordinary rule was excluded. Notwithstanding that, the ordinary rule was not held to be excluded. That being the law before the Act of Parliament was passed, the question is, what is the effect of this particular section of the Act, which recites that it is expedient that certain powers and provisions which it is now usual to insert in settlements, wills, and other instruments, should be made incident to the estates of the persons interested, so as to prevent the necessity of their being inserted into every such instrument. This will is, under the statute, to be taken to contain the particular clauses. It is said that this clause is not applicable, because of there having been provided £50 a year for maintenance. The statute does not say that the clause for maintenance is only to be taken to be included in the instrument, provided that there is not in the same instrument a maintenance clause which excludes it. Nevertheless, if

(1) 3 Atk. 430.
(2) 3 Russ. 263.
(3) 11 Ves. 1.
(4) 1 Ch. D. 232.

upon a fair construction of the instrument the insertion of the clause is negatived, the application of the statute should, I think, be deemed to be excluded. It appears to me that the question in this case is whether there is such exclusion. There may well be a power in trustees to maintain, although there is by the instrument provision made to a certain amount, such provision not being expressly said to be the only provision there shall be for maintenance. The Act says that the trustees may exercise the power "whether there be any fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education or not." In the present case, the trustees are, I think, at liberty to apply the income for maintenance, notwithstanding that there is another provision for maintenance. Numerous orders have been made by my predecessors allowing interest for maintenance under the statute in cases of legacies not carrying interest contingently or otherwise.

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From this decision *T. J. George,* the residuary legatee, appealed. The appeal was heard on the 23rd of April.

C. A.

Staffurth (*W. Pearson,* Q.C., with him), for the Appellant:—

Argument.

Independently of the statute, there is nothing in this will to prevent the ordinary rule from applying, that where a legacy is given to a child on his attaining twenty-one, and the testator makes a special provision for his maintenance, the infant is not entitled to interest on the legacy while it is in suspense: *Hearle* v. *Greenbank* (1); *Wynch* v. *Wynch* (2); *Ellis* v. *Ellis* (3). Therefore in this case the infant, if she attains twenty-one, will not become entitled to the intermediate income of her legacy, but, subject to the £50 a year set apart by the testator out of the residue for her maintenance, the whole income must be accumulated for the residuary legatee.

Then, with respect to the 26th section of the 23 & 24 Vict. c. 145, that section only gives power to the trustees to apply "the income to which such infant may be entitled in respect of such property." These words may apply to a case where the infant is

(1) 3 Atk. 716. (2) 1 Cox, 433.
(3) 1 Sch. & Lef. 1.

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only contingently entitled to the principal, and to the income in the meantime, but in this case the infant is not and never can become entitled to the income, whether she become entitled to the principal or not. *In re Cotton* (1) is quite consistent with this. The question as relates to this will has been decided by Vice-Chancellor *Malins* in *George* v. *Turnell* (2), where the same application was made with respect to the legacy given to the testator's son, *H. B. George*, and was refused by the Vice-Chancellor.

Morgan, Q.C., and *Cozens-Hardy*, for the infant:—

It is admitted that if it were not for the clause in the will providing £50 a year for the education of the infant, the Court would, even independently of the Act, have made an order for the application of the income of the legacy for maintenance, because the infant was a child of the testator, and would therefore, according to the ordinary rule, be entitled to interest on her legacy until it is payable. This rule can only be rebutted by an adequate provision for maintenance from some other source. If the fund provided is insufficient, the Court will apply part of the income of the legacy: *Chambers* v. *Goldwin* (3); *Martin* v. *Martin* (4); *Josselyn* v. *Josselyn* (5). In the present case, the maintenance provided is entirely insufficient, and, moreover, it is not from a separate source; it is part of the income of the same fund out of which the legacy is payable.

But we also rely upon the 26th section of the 23 & 24 Vict. c. 145. That section was intended to enlarge the powers of trustees, and the construction put upon it by the other side would render it almost nugatory. *In re Cotton* is distinctly in our favour. The words in the section, "income to which such infant may be entitled," must mean the income of the property to which the infant may be entitled. The following words, "whether there be any fund applicable to the same purpose," seem to contemplate such a case as this.

(1) 1 Ch. D. 232.
(2) 25 W. R. 182.
(3) 11 Ves. 1.
(4) Law Rep. 1 Eq. 369.
(5) 9 Sim. 63.

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Judgment, C. A. James, L.J.

JAMES, L.J.:—

No doubt the Vice-Chancellor was correct in considering that the Court is ready to make whatever orders are possible for the maintenance of infants. But the rule of law is well established that a contingent legacy does not carry interest while it is in suspense, except in the case of a legacy by a parent or one standing *in loco parentis* to the legatee; and that exception is subject to another exception, that the rule giving interest to the child does not take effect when the testator has provided another fund for his maintenance, so that the income of the legacy is supposed not to be required for the purpose. Then we come to apply the Act of the 23 & 24 Vict. c. 145 to that state of the law. The 26th section says that where property is held by trustees in trust for an infant either absolutely or contingently on his attaining the age of twenty-one years, it shall be lawful for the trustees to apply towards his maintenance or education "the whole or any part of the income to which such infant may be entitled in respect of such property." Therefore it must in the first place be income to which the infant is entitled, that is, to which he will be entitled if he become entitled to the legacy. That is the extent to which we can go in applying any of the property of the testator. In the present case this income is not income to which the infant is or ever can become entitled. If she attains twenty-one she will not become entitled to any of the intermediate income. I am therefore of opinion that we cannot in the name of interest apply any of the income under the statute.

Mellish, L.J.

MELLISH, L.J.:—

I am of the same opinion. The real question is, what the statute means by the words "the income to which such infant may be entitled in respect of such property." If the property is given either absolutely or contingently in such a way that the infant on coming of age would be entitled to both the principal and the intermediate income, the Act would apply. But in this will the testator has not given the income to the infant in any event. He has not only not given it to her, but he expressly gives it to another. I think, therefore, that the order of the Vice-Chancellor cannot be supported.

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BAGGALLAY, L.J.:—

I am of the same opinion. The testator has thought right to give £50 a year for the maintenance of each of his daughters, and has directed that the rest of the income shall be accumulated for his son. On what principle the Court can take any part of this accumulated fund from the son for the maintenance of the daughters I cannot conceive. It is said that power is given by the Act of Parliament, but I think it clear that the statute only applies to cases where the infant is either entitled absolutely to the principal and income, or is entitled to the principal contingently in such a manner as that he would on coming of age become entitled to the income also.

Solicitors: *Rooke & Son; Stevens & Co.*

C. A. 1877 V.-C. M. *March* 28. C. A. *April* 26.

JACKSON *v.* NORTH EASTERN RAILWAY COMPANY.

[1874 J. 51.]

Practice—Bankruptcy of sole Plaintiff—Continuance of Action by Trustee—Rules of Court, 1875, *Order* L., *rr.* 1, 2.

Where a sole Plaintiff becomes bankrupt he cannot continue the action. If there are two trustees in bankruptcy, and one refuses to go on, the other may have an order as of course to continue the action and make his co-trustee a Defendant.

The decision of *Malins*, V.C., reversed.

7 Ch D. 412 — 398. 16 QBD 115-7

Statement.

THE bill in this case was filed on the 13th of May, 1874, by *W. C. W. Jackson*, against the *North Eastern Railway Company*, *Robert Fletcher*, and two other persons, praying that the trusts of an indenture dated the 23rd of February, 1860, relating to the profits of certain collieries, under which the Plaintiff claimed repayment of £80,000, might be carried into effect.

On the 27th of November, 1874, the Defendants put in their answer.

On the 12th of January, 1875, the Plaintiff presented a petition for liquidation, which was agreed to by his creditors, and on the 8th of February, 1875, the Defendant *Robert Fletcher* and *C. Cooper* were appointed trustees of his estate.

Sc Thorp 7 Ch D. 573

Statement.

On the 10th of March, 1877, the Plaintiff applied at the Chambers of Vice-Chancellor *Malins* for an order for an extension of time to serve notice of trial, and the Vice-Chancellor made an order giving him an extension of time till the 5th of April, 1877, and directed that the costs should be costs in the cause.

On the 13th of March, 1877, the Plaintiff gave the Defendants notice of trial.

On the 28th of March, 1877, the Defendants the company moved before the Vice-Chancellor to discharge the order of the 10th of March, and the notice of trial.

Cotton, Q.C., and *Onslow*, for the Defendants.

Glasse, Q.C., and *Higgins*, Q.C., for the Plaintiff, relied on Rules of Court, 1875, Order L., rules 1, 2 (1).

Judgment, V.-C. M.

MALINS, V.C.:—

I believe the question now raised is an entirely new point, and has never before arisen in the Chancery Division.

This is a motion in effect to stop all further proceedings in the suit on the ground that the Plaintiff *Jackson* has become a bankrupt, that is to say, he is not actually a bankrupt, but he has entered into an arrangement with his creditors which is equivalent to bankruptcy, and has the effect of vesting all his property in trustees. This occurred before the *Judicature Act* came into operation, because the bill was filed in 1874, Mr. *Jackson* became bankrupt in January, 1875, and the Act came into operation on the 1st of November in that year. At that time the law was very

(1) Order L., r. 1: "An action shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue; and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*."

Rule 2: "In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law of any party to an action, the Court or a Judge may, if it be deemed necessary for the complete settlement of all the questions involved in the action, order that the husband, personal representative, trustee, or other successor in interest, if any, of such party, be made a party to the action, or be served with notice thereof in such manner and form as hereinafter prescribed, and on such terms as the Court or Judge shall think just, and shall make such order for the disposal of the action as may be just."

C. A. 1877 JACKSON v. NORTH EASTERN RAILWAY CO. Judgment, V.-C. M.

simple, that where a sole Plaintiff became bankrupt all his estate, interest, and rights in the suit became vested in the assignee, and the assignee was not bound under the 23rd section of the *Bankruptcy Act*, 1869, to go on with the suit, and the remedy of the Defendant was to move that the assignee of the bankrupt should be ordered to revive the suit within a limited time, or that the bill stand dismissed. Consequently the assignee had the sole option whether he would prosecute the suit or not, he was under no control whatever, and the Plaintiff had no dominion over the suit, so that if the suit was not revived it was dismissed with costs. That course of proceeding in some cases worked, I conceive, great injustice, because the bankrupt might have had a right of action for an amount far exceeding the amount of his debts, and might, if he recovered upon the action, have obtained sufficient to pay off all his debts; still he was unable to proceed with the action, and that in effect is the case here, for I understand that the Plaintiff's debts do not amount to any considerable sum, while if he succeeds in the action he will recover, it is said, as much as £80,000. That was the state of the law before the *Judicature Act* came into operation, but by that Act it stands thus: If a person who is a sole Plaintiff becomes bankrupt the proceedings are not necessarily stopped, but the bankrupt himself is at liberty under certain conditions, to go on with the suit; this is under the 1st and 2nd rules of Order L., and if the Plaintiff's counsel is right it is an entire revolution in the practice which may be eminently advantageous to a suitor.

The 1st rule is this: "An action shall not become abated by reason of the marriage, death, or bankruptcy of any of the parties if the cause of action survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*." That is evidently a complete alteration of the law, because it is clear that before this Act the suit became abated upon the marriage, or death, or bankruptcy of any of the parties, but now it is enacted that in such cases the suit shall not become abated if the cause of action survive or continue. In this case there is no surviving, because the Plaintiff is not a joint tenant with any one else, but a sole Plaintiff; but if Mr. *Jackson* is right the cause of action continues, and the action does not abate if the

cause of action survive or continue; but is it right that he should be at liberty to continue the suit without the leave of his assignee, or in this case of his trustee? That is provided for by the 2nd rule, which is this: "In case of the marriage, death, or bankruptcy, or devolution of estate by operation of law, of any party to an action, the Court or a Judge may, if it be deemed necessary for the complete settlement of all the questions involved in the action, order that the husband, personal representative, trustee, or other successor in interest, if any, of such party, be made a party to the action, or be served with notice thereof, in such manner and form as hereinafter prescribed, and on such terms as the Court or Judge shall think just, and shall make such order for the disposal of the action as may be just." Here the application is by the Defendants, that the suit may be absolutely stayed. That would, in my opinion, be an injustice to the Plaintiff, and it would be opposed to the spirit and meaning of the order. What is the next thing to be done? It is not necessary in all cases that the assignee should be a party, but the Court may order that the husband, in case of a marriage, or the personal representative, in the case of a death, or the trustee or other successor in interest, in the case of bankruptcy of such party, be made a party to the action, or be served with notice thereof. Therefore it is in the discretion of the Court, and if the trustees were perfectly indifferent, probably I should make an order that they should both be parties: one of them is not indifferent, but is in the interest of the *North Eastern Railway Company*, he being their trustee and a creditor of Mr. *Jackson*. I do not think I could with propriety make him a party, and I could not make him a Plaintiff, because he is now a Defendant, and being a Defendant, I think he must remain a Defendant. I could not make both trustees parties, and it is not necessary that I should do so. But then the order says, "or be served with notice thereof in such manner and form as hereinafter prescribed, and on such terms as the Court or Judge shall think just." Then the 13th rule of Order XVI. gives me power at any stage of the proceedings, either upon or without the application of either party, and on such terms as I may think just, to order the name or names of any party or parties to be added whose presence before the Court is necessary. Therefore,

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under the two orders I have complete power to add the names of the assignees or trustees as parties, or to order them to be served with notice of the proceedings. If that is the right meaning of the order, then that is the course I am bound to take.

With regard to this suit, I am told that *Cooper*, who is the other trustee, is anxious that the suit should go on, though he does not desire to incur any risk in regard to it. In his case justice will be done by giving him notice of the continuance of the suit, as the other trustee has notice by being a Defendant. Now is any injustice done to that Defendant? It is clear that the Plaintiff having become a bankrupt, the Defendants would be entitled to security for costs, and in this way the Court has power to protect the Defendants against any injustice being done to them.

I think, therefore, in the first place, that the suit has not necessarily abated by the bankruptcy of the Plaintiff; and I also think that I have the power to give notice to the trustee, who is not a Defendant, or order him to be made a party, and in my opinion justice will be done by taking the former course, and I therefore order him to be served with notice, under Order L., rule 2, of the continuance of the suit. The motion must consequently be refused, and with costs.

C. A. From this decision the Defendants, the company, appealed. The appeal was heard on the 9th of May.

Argument. *Onslow* (*Cotton*, Q.C., with him), for the Appellants:—

Our first objection to these orders is that the suit was commenced and the Plaintiff's petition for liquidation was presented before the Judicature Acts came into operation; and therefore Order L., rule 1, does not apply to the case. Consequently the old practice applies and the suit has become abated: *Foster* v. *Gamgee* (1).

In the second place, if the case is governed by the new rules, Order L., rule 1, on which the Vice-Chancellor based his orders, does not apply to a sole Plaintiff, for it only refers to the death of a party where the cause of action survives or continues. The

(1) 1 Q. B. D. 666.

proper course is for the Defendant company to give notice to the trustees in the liquidation, under rule 2 of the same Order, and then the Court will make such order as may seem just: *Wright* v. *Swindon, Marlborough, and Andover Railway Company* (1).

Argument.

Higgins, Q.C. (*Glasse*, Q.C., with him), for the Plaintiff:—

The difficulty in the present case is, that one of the trustees is already a Defendant in a different interest, and he does not wish to proceed with the suit.

[JESSEL, M.R.:—It has been decided that where a Plaintiff is bankrupt, and there are two trustees and one refuses to go on, the other may carry on the suit and make his co-trustee a Defendant. But here the Vice-Chancellor has ordered the bankrupt to carry it on, although he has no interest.]

The Vice-Chancellor acted under the 2nd rule of Order L., which empowers the Court to make such order as may seem just.

Judgment, C. A. Jessel, M.R.

JESSEL, M.R.:—

It is quite plain that the bankrupt cannot continue the suit as Plaintiff. Therefore we discharge the orders and notice of trial.

James, L.J.

JAMES, L.J.:—

I agree that the orders and notice must be discharged. If one of two trustees in a bankruptcy is willing to continue it at his own risk, he can do so, and he can get the proper order by applying for it as a matter of course.

Baggallay, L.J.

BAGGALLAY, L.J.:—

I am of the same opinion. But there is another difficulty behind, namely, that this bankruptcy took place before the *Judicature Act* came into operation, and before the new rules were in force.

Solicitors: *Bell, Steward, & Co.; W. F. Nokes.*

(1) 4 Ch. D. 164.

C. A.
1876
V.-C. B.
Nov. 24.
Dec. 7, 8.

C. A.
1877
May 8, 9.

CHEAVIN *v.* WALKER.

[1876 C. 312.]

Injunction—Trade-mark—Expired Patent—Retention on Label of Word "Patent"—Misrepresentation.

In 1862 a patent for improvements in filters was taken out by *S. C.* in the name of himself and of his son *G. C.*, aged seventeen. After the death of *S. C.* in the same year, the business was carried on by *G. C.*, who made and sold filters under the title, and marked with a label as "*S. C.'s* Improved Patent Gold Medal Self-cleaning Rapid Water Filters." The patent of 1862 was allowed to lapse in 1865. In 1867 *G. C.*, who had then attained twenty-one, altered his label to "*G. C.'s* Improved Patent Gold Medal Self-cleaning Rapid Water Filters," above which was a medallion containing the royal arms, surmounted by the words "By Her Majesty's Royal Letters Patent." The Defendants, who had been in *G. C.'s* employ, set up in business in the same town in 1876 as makers and sellers of filters, which were similar in appearance to those of *G. C.*, and inscribed with "*S. C.'s* Patent Prize Medal Self-cleaning Rapid Water Filters, Improved and Manufactured by *W. & Co.*":—

Bacon, V.C., having granted an injunction restraining the Defendants from using their label,

Held, by the Court of Appeal (reversing the Vice-Chancellor's decision),

First, that the label used by the Plaintiff was not a trade-mark, but only a description of the article as made according to *S. C.'s* patent, which was common to all the public:

Secondly, that there was nothing in the Defendants' label calculated to mislead the public by a fraudulent imitation of the Plaintiff's label:

Thirdly, that the Plaintiff's label, coupled with the medallion of the royal arms, constituted a false representation that the patent was still subsisting, and disentitled the Plaintiff to relief by injunction.

Singer Manufacturing Company v. *Wilson* (1) and *Leather Cloth Company* v. *American Leather Cloth Company* (2) discussed.

Statement.

THIS was an action to restrain an infringement of the Plaintiff's trade-mark.

On the 26th of April, 1862, letters patent for the manufacture of a filter were granted to *S. Cheavin* (the Plaintiff's father) and the Plaintiff, then aged seventeen, jointly.

S. Cheavin died in August, 1862, before he had been able to bring the manufacture of filters under this patent into extensive operation. The Plaintiff had ever since manufactured and sold

(1) 2 Ch. D. 434. (2) 11 H. L. C. 523.

filters at *Boston* for some time under the style of "*S. Cheavin,*" and used that name on his filters, but, since 1867, when he came of age, he traded under his own name.

The filters, which were stated to have acquired great reputation both in this country and abroad, and obtained several prize medals and diplomas, bore a tablet which, after 1867, was a follows: "*G. Cheavin's* Improved Patent Gold Medal Self-cleaning Rapid Water Filter, *Boston, England;*" above which was a medallion containing the royal arms, surrounded by a band or garter with the words "By Her Majesty's Royal Letters Patent," and the filters were generally known and asked for in the trade and by the public as *Cheavin's* filters. The patent of 1862, on the principle of which the Plaintiff's filters were manufactured, had been allowed to lapse in 1865. The Defendants *Brightman* and *Bailey* were formerly in the Plaintiff's employ, and had recently commenced and were now carrying on at *Boston* the business of manufacturing and selling filters made upon the principle of the Plaintiff's filters, and bearing externally so close a resemblance to them that the difference between them was not perceptible except upon a close examination.

The Defendants placed upon their filters a tablet or inscription bearing the following words:—"*S. Cheavin's* Patent Prize Medal Self-cleaning Rapid Water Filter, Improved and Manufactured by *Walker, Brightman, & Co., Boston, England.*"

The Defendants had also issued circulars relative to these filters, in which the phraseology of the Plaintiff's circulars relative to his filters was to some extent copied.

On finding out, in August, 1876, that the Defendants were making and selling these filters, the Plaintiff called upon them to desist from infringing his trade-mark. Some correspondence took place. The Defendants, in order to meet the Plaintiff's objection to the prominence given to the words "*S. Cheavin,*" and to avoid litigation between near relatives (*Brightman* being the Plaintiff's brother-in-law), offered to alter their labels by reducing the size of the words "*S. Cheavin's,*" and to increase the size of the words "*Walker, Brightman, & Co.*" The Plaintiff insisted upon his right to have the name "*Cheavin*" entirely removed from the Defendants' filters, and this not being conceded, he had issued a

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Statement.

writ and delivered a statement of claim, by which he claimed an injunction to restrain the sale of filters bearing the name "*Cheavin*" or "*S. Cheavin*" marked or inscribed thereon, or any colourable imitations of the inscriptions used by the Plaintiff.

To this statement of claim the Defendants demurred on the following grounds :—

1. There had been no infringement of the Plaintiff's trade-mark, as it was distinctly stated on the Defendants' label that their filters, made on *Cheavin's* principle, in which the Plaintiff had no monopoly, were manufactured by themselves.

2. The misrepresentation on the Plaintiff's label in calling his filters "patent," though the patent of 1862 had long since expired, was such as to prevent him from obtaining relief, even assuming that a case of infringement had been established.

On the 24th of November, Vice-Chancellor *Bacon* overruled the demurrer, holding that there was a sufficient *primâ facie* case of right in the Plaintiff, and of infringement by the Defendants, for allowing the action to proceed to a hearing and the question to be tried; and intimating that he was not at present satisfied that the Plaintiff, by continuing to use the word "patent" on his label after the patent had expired, had lost his right to have the trade-mark, of which that word formed a part, protected.

On the 5th of December, 1876, the Defendants, *Brightman* and *Bailey*, delivered their statement of defence, by which they stated that, in 1853, when the Plaintiff was only nine years old, his father, *Squier Cheavin*, took out a patent for manufacturing filters, and the filters now manufactured by themselves and the Plaintiff were manufactured on the principles of the patents of 1853 and 1862 (expired in 1865). The Plaintiff's title to any trade-mark which his father had was denied on the ground, as stated in Defendants' affidavit, that *Squier Cheavin* died intestate, and no administration had been taken out. It appeared, however, that *S. Cheavin* did leave a will, but that it had never been proved, from the very small amount of property belonging to him at his death.

Both the Defendants admitted that they had been in Plaintiff's employ. *Brightman*, who was a brother-in-law of Plaintiff, stated that he had been previously in the employ of Plaintiff's father,

and afterwards in that of *Pike*, an inn-keeper, and *Harvey*, a solicitor of *Spalding*, who were alleged to have made and sold filters in partnership, according to *Squier Cheavin's* patent, from 1856 down to *Pike's* death in August, 1870. This manufacture was continued by *Pike's* nephew, *William Grinnell*, until his death, two or three years ago. It was alleged that Messrs. *Pike & Harvey*, and afterwards *Grinnell*, called their filters "*Cheavin's*," or "*S. Cheavin's*" filters, and put upon them the inscription "*S. Cheavin & Co.*," or "*S. Cheavin & Co.'s* patent," to the knowledge of Plaintiff and his father, and the filters so made and sold were stated to have been well known to the public as "*Cheavin's*," or "*S. Cheavin's* filters."

On the part of the Plaintiff evidence was adduced contradicting many of the statements contained in the Defendants' affidavit —in particular that *Harvey* and *Pike* were in partnership; that *Brightman* was employed by them down to the death of *Pike* in 1870, and afterwards by *Grinnell* in the manufacture of filters; that *Brightman* was ever employed by *Pike* after 1863, or by *Grinnell* at all; that after 1867 the name *Cheavin* was ever placed by *Pike* on the filters manufactured and sold by him.

With respect to Messrs. *Pike* and *Harvey*, the Plaintiff's case was that his father, *S. Cheavin*, was assisted by them with money to enable him to work his patent of 1853, and that down to 1859 there was a *quasi* partnership between *S. Cheavin* and *Pike*, under an agreement made in 1856.

Harvey was *S. Cheavin's* solicitor, and was authorized by him to receive £300 from *Pike* out of the profits arising from the sale of filters, under the agreement of 1856, in discharge of money advanced by *Harvey* to *S. Cheavin*.

In 1859, *S. Cheavin* removed from *Spalding* to *Boston*, and there set up filter making, while *Pike* continued to make filters down to his death in 1870, but in 1867 discontinued the use of the name *Cheavin & Co.* The Plaintiff admitted that he knew that *Pike* was manufacturing filters upon the principle of his father's patent of 1853, but did not interfere with him, as he supposed there was some arrangement between *Pike* and *S. Cheavin* for a licence; and also because the filter business of *Pike* was so trifling, and Plaintiff's business, up to 1867, comparatively small. In 1867 the

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Plaintiff altered his label, by inserting his own name, "*G. Cheavin*," instead of "*S. Cheavin*."

With respect to *Brightman*, who was Plaintiff's brother-in-law, the Plaintiff had, since 1866, taken him into his employ at £1 a week out of compassion, and taught him how to manufacture filters. *Bailey* was taken into the Plaintiff's employ in 1875. In July, 1876, they were both discharged, and they at once sought for capital to assist them in setting up a rival manufacture.

The Defendant *Walker* was induced to find money, upon which the three started in business as manufacturers of filters, and had opened a stand in *Boston* and *Spalding Market Place*, where they sold the filters complained of; though it was admitted that the Defendant *Bailey*, who was in charge of the stand, told one of the Plaintiff's witnesses, who on seeing filters so closely resembling those made by the Plaintiff in size, shape, appearance, and labels, took them to be the Plaintiff's goods, that the filters there offered for sale were not made by the Plaintiff but by the Defendants.

The case came on for hearing before Vice-Chancellor *Bacon* on the 24th of November, 1876.

Argument.

Kay, Q.C., and *J. Cutler*, for the Plaintiff:—

The Plaintiff is entitled to the exclusive use of the word "*Cheavin*," and to restrain the Defendants from adopting the word "*Cheavin*," which is the essential part of his label or trade-mark, under which his goods have been sold and acquired reputation in the market since 1862, and which has become the denomination of the particular article: *Hall* v. *Barrows* (1). The Defendants have made their filters in every respect similar to those of the Plaintiff, and as evidence of their intention to deceive, the use of small type for their own names and of large type for the words they have taken from his label, "*Cheavin's* Patent Filters," is an important element: *Singer Manufacturing Company* v. *Wilson* (2).

Though the Defendants may not themselves have represented to purchasers that their filters are of the Plaintiff's manufacture, the statement on their label will enable others to pass off the filters as of the Plaintiff's manufacture; and this is a deception and false representation which gives the original owner of the

(1) 4 D. J. & S. 150. 10 Jur N.S. 56 (2) 2 Ch D. 434.

trade-mark a right of action: *Sykes* v. *Sykes* (1). In equity it is not necessary, in order to obtain an injunction, that there should have been fraud or misrepresentation; the use of a trade-mark which has been taken innocently and in ignorance of the right of the Plaintiff will equally be restrained: *Millington* v. *Fox* (2).

Then does the addition of the words, "improved and manufactured by *Walker, Brightman, & Co.*," affect the Plaintiff's rights? If a material and substantial part of a trade-mark, to which Plaintiff has established his exclusive right, has been taken, the Defendant cannot shelter himself by affixing his own name as maker of the article in connection with the words taken, as is shewn by the cases of "*Bustard & Co.'s Excelsior* White Soft Soap": *Braham* v. *Bustard* (3); "*Bolton's LL.* Whiskey:" *Kinahan* v. *Bolton* (4); "*Foster, Porter, & Co.'s* Improved *Eureka* Shirts": *Ford* v. *Foster* (5). By saying that the particular article is manufactured by him, a man does not become entitled to take my trade-mark, nor, by adding something more, to use that which is a material part of my trade-mark. Then, as to the use of the word "patent" in the Plaintiff's label, the test is, whether the term "patent," though no longer applicable, was adopted truly and with foundation in the first instance. If, as in this case, there was originally a patent, and the goods have acquired value or attracted confidence under a label which truly stated, when first introduced, that the goods were protected by a patent, the continued use of that label after the patent has expired is not such a misrepresentation as to deprive the Plaintiff of his right to protection: *Edelsten* v. *Vick* (6); and the same principle applies where the word "patent," from having become a term of art, is used in such a way as not to deceive the public: *Marshall* v. *Ross* (7). The remarks of Lord *Kingsdown* in *Leather Cloth Company* v. *American Leather Cloth Company* (8), to the effect that he should have great difficulty in assenting to this distinction, are merely *dicta*, and the case was decided on other grounds. The *Singer Manufacturing Company* v. *Wilson* (9) will be relied upon by the Defendants, but

(1) 3 B. & C. 541.
(2) 3 My. & Cr. 338.
(3) 1 H. & M. 447.
(4) 15 Ir. Ch. Rep. 75.
(5) Law Rep. 7 Ch. 611.
(6) 11 Hare, 78.
(7) Law Rep. 8 Eq. 651.
(8) 11 H. L. C. 543.
(9) 2 Ch. D. 434.

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that was not a case of the use of the Plaintiff's trade-mark, but of representations made by the Defendant in his trade circulars and advertisements as distinguished from his trade-mark and label, and there being no evidence whatever of any fraud or false representation by the Defendant, "and no means put into the hands of any persons whatever to commit a fraud, or to assist in committing a fraud," the Plaintiff's case there failed (1).

In this case the circulars of the Defendants are almost identical with those of the Plaintiff. No injunction is claimed in respect of these circulars, but the Court will look at them as evidence of the *mala mens* of the Defendants.

Sir *H. Jackson*, Q.C., and *W. G. F. Phillimore*, for the Defendants:—

We say, 1, that the Plaintiff has not made out his title to a monopoly of the word "*Cheavin*" in connection with filters, or to have his trade-mark protected; and, 2, assuming that he has established his title, what the Defendants have done does not amount to infringement.

Upon the first point, the evidence shews that from 1856 to 1872 there has been a concurrent use of the words "*S. Cheavin*," or "*Cheavin & Co.*," by *Pike* and others, without complaint or attempt to restrain such use on the part of the Plaintiff. The word "*Cheavin*," therefore, as applied to filters has lost its character of a personal description and become a generic name used to describe filters manufactured on a particular plan which has been open to all the world since the expiration of the patent in 1865.

The Defendants, without any fraud, have acquired the mode of manufacturing these filters, and are entitled to call them *Cheavin's* Patent Filters, provided they do not suggest that such filters are made by the original patentee or that they are selling for the Plaintiff: *James* v. *James* (2). There can be no injunction so long as they represent on their label that these filters are of their own manufacture; the words "*Cheavin's* Patent" having come to signify filters manufactured according to the principle of that patent: *Wheeler and Wilson Company* v. *Shakespear* (3). Adopting the

(1) 2 Ch. D. 451–453. (2) Law Rep. 13 Eq. 421.
(3) 39 L. J. (Ch.) 36.

words of the Master of the Rolls in *Singer Manufacturing Company* v. *Wilson* (1): "Could anybody say that a person reading that statement would buy the Defendants' filters as being the genuine filters made by *Cheavin* himself? I am not, as I consider, to decide cases in favour of fools and idiots, but in favour of ordinary English people, who understand English when they see it, and are not deceived by any difference in type, but who have before them a plain statement."

[BACON, V.C., called attention to the similarity of the Defendants' circulars in collocation of paragraphs and numerous particulars.]

It may not be in good taste, but the Defendants have a perfect right to adopt eulogistic descriptions of filters made according to *Cheavin's* patent. If they have a right to sell the goods they have a right to praise them, and therefore to use the testimonials and every comment which praises the goods: *James* v. *James* (2), especially as there is nothing in the circulars which would lead persons reading them to believe that they referred to filters made by the Plaintiff, *G. Cheavin*.

In the absence of evidence that any one has been in fact deceived, the Court is not justified in assuming that such has been the case: *Woollam* v. *Ratcliff* (3).

Then as to the title of the Plaintiff. He is not the representative of his father, whose will was never proved, and whose estate has never been administered, and by carrying on that business after his father's death, the Plaintiff has not acquired such an exclusive personal right to his father's trade-mark as will be protected in equity: *Hovenden* v. *Lloyd* (4).

If the Plaintiff has acquired any trade-mark in his label there has been misrepresentation of an important fact by the false assertion of patent right such as to disentitle him to relief against any one who pirated it. We rely on the observations of Lord *Kingsdown* in the *Leather Cloth Company* v. *American Leather Cloth Company* (5)—which are not mere *dicta*, but expose authoritatively the fallacy of extending, as in *Edelsten* v. *Vick* (6), the right to

(1) 2 Ch. D. 447.
(2) Law Rep. 13 Eq. 421.
(3) 1 H. & M. 259.
(4) 18 W. R. 1132.
(5) 11 H. L. C. 543.
(6) 11 Hare, 78.

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continue on a trade-mark the statement of protection by patent after it has ceased to be true—"If the trade-mark represents the article as protected by patent, when, in fact, it is not so protected, I cannot think that it can make any difference whether the protection never existed or whether it has ceased to exist." It may be hard that a trader should be compelled to alter his labels and trade-marks on the expiration of his patent, but that consideration does not here apply, as the trade-mark in respect of which the Plaintiff sues was not adopted until 1867, two years after the patent had expired.

Kay, in reply:—

The *Singer Manufacturing Company* v. *Wilson* (1) was not a case of trade-mark but of trade circular, and the decision was based upon the fact that the Defendant had not used the word "*Singer*" as part of his trade-mark, and had used it in his circulars and advertisements in such a way as not to pass off his machines as being manufactured by the *Singer Company*.

Judgment, V.-C B.

BACON, V.C.:—

That a trade-mark is property cannot reasonably be doubted, and in no case was this put more pointedly than in *Leather Cloth Company* v. *American Leather Cloth Company* (2).

The patent obtained by the Plaintiff's father in the name of himself and the Plaintiff, in 1862, was valid while it lasted, and the fact that the Plaintiff—who was jointly interested in it with his father, with whom he was in partnership—was at the time an infant did not affect its validity, as *S. Cheavin*, the father, had a perfect right to take out the patent in the joint names of himself and his son. On the death of his father, in 1862, the Plaintiff continued to carry on the business for some years in the name of his father, and after that, for the last nine years, in his own name; and during all that time he placed the tablet or label mentioned in the pleadings upon all the articles manufactured by himself. All this is distinctly admitted on the pleadings, and, as it appears to me, the Plaintiff is unquestionably entitled to this trade-mark, in respect of which, as a trade-mark, and nothing else, he now sues.

(1) 2 Ch. D. 434. (2) 11 H. L. C. 543.

The true rule which is established by the cases is that when the right to a trade-mark has been established, no man can lawfully interfere with it; no one can take another man's property, and this is what the Defendants have done. The Defendants, having been in the Plaintiff's employ, acquired the art, such as it is, of making these filters. The connection was broken up, and the Defendants set up in business for themselves. They were perfectly entitled to do so, and to make filters in accordance with the patent that was originally granted to the Plaintiff and his father, but they had no right to stamp on their filters the distinctive trade-mark which had been adopted by the Plaintiff to distinguish his filters from similar articles in the market. The identity of the two filters is beyond question, and no jury could hesitate to determine that the Defendants had plainly and positively copied the Plaintiff's filters in shape, colour, and, with unimportant differences, the inscription on his label. The statement by the Defendants, given in a very reticent way in Court, of how they got their filters made, did not give me a good impression of their candour. They declined to give any evidence as to the model or pattern or drawing which they must have sent to the potteries to be copied from, and did not produce the communications which took place between themselves and the manufacturer at the potteries. The property in this trade-mark being established, as I take it, beyond question, the imitation is also established, and the fact of infringement is plain and manifest. But then it is said that the Plaintiff's right of property is impaired because there had been some obscure transactions between the Plaintiff's father and one *Pike*, and also one *Harvey*, a solicitor, who diversified his legal pursuits by making filters. The Defendants insist that the fact that the Plaintiff's father allowed those persons to make filters according to *Cheavin's* process has deprived the Plaintiff of his right to be protected in the use of his trade-mark. But none of the filters so made bore the inscription which the Plaintiff claims as his trade-mark, and this contention may be dismissed as wholly irrelevant to the case. The Plaintiff, by being a partner with and surviving his father, had a right to adopt the name "*S. Cheavin*," and a perfect right to change it to his own name, "*G. Cheavin.*," when he was himself carrying on business alone; and there was no misrepresentation, unless indeed

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there was any in the use of the word "patent," on which I will presently observe. The test in these cases is whether the Defendants have wilfully imitated, and therefore infringed, the Plaintiff's property, in order to denote that their goods are goods of the genuine manufacture of the Plaintiff. That was the test laid down in the whisky case (*Kinahan* v. *Bolton* (1)); the *Eureka* shirt case (*Ford* v. *Foster* (2)); and especially in *Sykes* v. *Sykes* (3), a most valuable case, and not less valuable because it is shortly reported. The *Singer Manufacturing Company* v. *Wilson* (4), on which great reliance has been placed by the Defendants, has, in my judgment, no sort of application. The decision did not proceed upon trade-mark, and excluded the question of trade-mark. The right of the Defendant to make and sell machines as being manufactured on the *Singer* principle was established, but it positively excluded any right to stamp on them that which was the exclusive trade-mark of the Plaintiff, and which he alleged in his bill. It was found that the Plaintiff had a trade-mark of his own, but that "*Singer*" was not a material part of that trade-mark, but even if it had been, the Defendant in that case was not in the slightest degree to blame as he had not adopted for his trade-mark the name of *Singer*.

The most important case relied on by the Defendants was the *Leather Cloth Company* v. *American Leather Cloth Company* (5), which contains some valuable observations of Lord *Kingsdown*, but did not, so far as the decision of the case was concerned, proceed upon those observations of Lord *Kingsdown* alone or even to any considerable extent. The general rule seems to be, that the misstatement of any material fact will deprive the owner of a trade-mark of his relief in equity against any one who may have pirated it. It is not, and cannot be, suggested that the use of the word "patent" as a description of the Plaintiff's filters in his label was introduced for any other purpose than to assert that a patent had been granted in respect of the process on which his filters were made, and not to prevent other persons from making similar instruments, which might be done by anybody, by all the world, after the patent had expired or fallen through. Lord *Kingsdown* says,

(1) 15 Ir. Eq. Rep. 75.
(2) Law Rep. 7 Ch. 611.
(3) 3 B. & C. 541.
(4) 2 Ch. D. 434.
(5) 11 H. L. C. 523.

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further, that the term may be merely part of the designation of an article which has become known in the market by that term. It is proved that these filters have been known as *Cheavin's* patent filters since 1862, and that is the reason for which the title has been adopted by the Plaintiff, who was fairly and justly entitled to call himself a patentee, the Queen's letters patent having been granted to him by name. If it was so expressed as to mislead any person into imagining that the Plaintiff was thereby asserting that he still had the exclusive right to manufacture these commodities, then it would be open to the objection that is taken by Lord *Kingsdown*. If it falls short of that, then the observations of Lord *Kingsdown* are in favour of the Plaintiff. In the *Leather Cloth* case there had been false representation and intimations given to the public that the commodity they were invited to buy was different from that which was in fact sold. That I take to be the main ground of the decision in the House of Lords. Reading those observations of Lord *Kingsdown* and of Lord *Westbury* (1) in the same case in connection with the facts now before me, I read them as being in favour of the Plaintiff. It would be, in in my opinion, to misunderstand the judgment in the *Leather Cloth* case if I were to hold, as I am invited to do, that when a manufacturer who has had a patent stamps that description on the commodity that he is selling and so describes it, he deprives himself of the protection which the law would otherwise give him. The Plaintiff is entitled to use that trade-mark if it has properly acquired that designation, and that it has acquired that designation in the market is here abundantly proved.

[His Lordship, after commenting upon the conduct of the Defendants, the correspondence, and their circulars and advertisements, which were relied upon by the Plaintiff as evidence of the *mala fides* of the Defendants, said:—]

In my judgment the Plaintiff's trade-mark has been deliberately, intentionally, and in bad faith imitated and adopted by the Defendants, and the Plaintiff is therefore entitled to an injunction with an inquiry as to damages, and the costs of suit.

From this decision the Defendants appealed. The appeal was heard on the 8th and 9th of May, 1877. C. A.

(1) 11 H. L. C. 546. 11 Jur. N.S. 573

C. A. 1877

CHEAVIN v. WALKER.

Sir *H. Jackson*, Q.C., and *W. G. F. Phillimore*, for the Appellants.

Kay, Q.C., and *J. Cutler*, for the Plaintiff.

The same lines of argument were followed as at the hearing before the Vice-Chancellor.

Judgment, C. A. Jessel, M.R.

JESSEL, M.R. :—

The first question which we have to consider is whether the Plaintiff has any trade-mark at all. I am of opinion that he has no trade-mark. What he uses is an inscription which he chooses to place or bake on his filters, and which tells its own story. The patent taken out by the Plaintiff's father was for improvements in filters, and the inscription shews that the filter is made in accordance with that patent. The inscription is not in distinctive characters, but in ordinary type. There is nothing in it to shew that it was made by any particular manufacturer. It is not possible to say that such an inscription is a trade-mark.

The second question is with regard to the effect of the use of the word "Patent" by the Plaintiff. The question was fully discussed in the case in the House of Lords, *Leather Cloth Company* v. *American Leather Cloth Company* (1), and I have nothing to add to what was there said. No doubt a man may use the word "Patent" so as to deceive no one. It may be used so as to mean that which was a patent, but is not so now. In other words, you may state in so many words, or by implication, that the article is manufactured in accordance with a patent which has expired. But if you suggest that it is protected by an existing patent, you cannot obtain the protection of that representation as a trade-mark. Protection only extends to the time allowed by the statute for the patent, and if the Court were afterwards to protect the use of the word as a trade-mark, it would be in fact extending the time for protection given by the statute. It is, therefore, impossible to allow a man who has once had the protection of a patent to obtain a further protection by using the name of his patent as a trade-mark.

But further, no man can claim a trade-mark in a falsehood. It

(1) 11 H. L. C. 543.

is a falsehood to represent that the patent is still subsisting. Therefore the Court has to consider, in the present case, whether there is such a false representation on the Plaintiff's filters. Above the inscription there is a medallion consisting of the royal arms surrounded by a circular band or garter containing the words "By Her Majesty's Royal Letters Patent." That appears to me to be a representation that the patent is an existing patent. And on that ground alone I think the Plaintiff ought not to succeed in this action.

Judgment, C. A. Jessel, M.R.

As to the third ground relied on by the Plaintiff, that supposing the inscription not to be a trade-mark, it is an advertisement, which the Defendants have fraudulently imitated, I cannot see any fraudulent imitation in the Defendants' labels. The words used by the Plaintiff import that the filter is made by him according to *Cheavin's* expired patent. The Defendants' label is as follows: "*S. Cheavin's* Patent Prize Medal Self-cleaning Rapid Water Filter, Improved and Manufactured by *Walker, Brightman, & Co., Boston, England.*" That is to say, that the filter is manufactured according to *Cheavin's* expired patent by *Walker, Brightman, & Co.* I can see no fraudulent imitation in that statement. Fraud is the foundation of all this branch of jurisdiction, and unless fraud is proved, this Court ought not to interfere. The appeal must, therefore, be allowed, and the action must be dismissed.

JAMES, L.J.:— James, L.J.

I am of the same opinion. It is clear that on the expiration of this patent it was open to all the world to manufacture the article which had been patented; that is the consideration which the inventor gives for the patent; the invention becomes then entirely *publici juris.* The Plaintiff, and also the Defendants, had a right to tell the world that they were making the article according to the expired patent, and both parties have done this. It is impossible to allow a man to prolong his monopoly by trying to turn a description of the article into a trade-mark. Whatever is mere description is open to all the world. In the present case the Plaintiff's label was nothing more than a description, and he cannot therefore have protection for it as a trade-mark.

With respect to the question of misrepresentation, I agree with

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the Master of the Rolls. The question is whether the inscription on the Plaintiff's filter contained a representation of what was false. No doubt the Plaintiff did not mean to tell a lie, but when the matter comes into a Court of Justice, the Court cannot assist in the continuance of a misrepresentation. Here, taking the whole inscription together, including the royal arms and the words "By Her Majesty's Royal Letters Patent," I think it indicates the present continuance of the patent. It was sufficient to lead the public to the conclusion that the article was made according to a patent which had not expired but was still continuing.

The Plaintiff had no right to embarrass the world by claiming the benefit of a patent which had expired.

The last point for decision is whether the Defendants have done anything which amounts to a fraud, in having imitated the Plaintiff's inscription in such a way as to lead an unwary purchaser to suppose that the article was manufactured by the Plaintiff. In my opinion nobody would suppose that it was manufactured by the Plaintiff; the Defendants expressly and very plainly say that it is manufactured by *Walker, Brightman, & Co.* The truth is that the case really made by the Plaintiff is not that the Defendants pretend that the filters are made by him, but that they allege that they are made under *Cheavin's* patent; to which the Plaintiff has no right to object.

Baggallay, L.J. BAGGALLAY, L.J. :—

I am of the same opinion. As to the question of misrepresentation, I adopt Lord *Kingsdown's* words in *Leather Cloth Company* v. *American Leather Cloth Company* (1): "If a trade-mark represents an article as protected by a patent, when in fact it is not so protected, it seems to me that such a statement *primâ facie* amounts to a misrepresentation of an important fact, which would disentitle the owner of the trade-mark to relief in a Court of Equity against any one who pirated it. In *Flavel* v. *Harrison* (2) Vice-Chancellor *Wood* intimated his opinion that this would be so when there never had been any patent at all; but in the subsequent case of *Edelsten* v. *Vick* (3) he seems to doubt whether the

(1) 11 H. L. C. 543. 11 Jur N.S. 578 (2) 10 Hare, 467. 17 Jur 81
(3) 11 Hare, 78.

rule would be the same if there had originally been a patent, and the statement in the trade-mark being true when first introduced, had been continued after it had ceased to be true. I confess that I should have great difficulty in assenting to that distinction. If the word 'patent' be not so used as to indicate the co-existing protection of a patent, but merely as part of the designation of an article known in the market by that term (and this I collect to have been the main ground of His Honour's decision), then I quite agree in his view. In such case nobody is meant to be deceived, or is deceived; a patent may have expired, and be known to have expired, fifty years ago, and yet the name of 'patent' may have become attached to the article and be used in the trade as designating it; but if the trade-mark represents the article as protected by patent, when in fact it is not so protected, I cannot think that it can make any difference whether the protection never existed or has ceased to exist."

If we only had to deal with the part of the inscription which is described as a trade-mark, I should have thought that it contained no misrepresentation; but you cannot disconnect it from the medallion and the royal arms. An ignorant person would suppose that the article was protected by the patent—that is a sufficient ground for refusing the Plaintiff relief. But he also fails in the case made in his statement of claim, that the public were led to believe that the filters were manufactured by the Plaintiff. In my opinion there is nothing in the Defendants' inscription which would mislead unwary persons; there is nothing in the shape or arrangement of the letters which shews an intention to imitate the Plaintiff's inscription.

The Vice-Chancellor thought that the words "*Cheavin's* Patent" were calculated to deceive the public. But "*Cheavin's* Patent" is a correct description of the principle according to which the article was made, and then there follows a distinct statement that it was manufactured by *Walker, Brightman, & Co.* Therefore on this ground also the case made by the Plaintiff's claim fails. The appeal must be allowed and the action dismissed with costs.

Solicitor for Plaintiff: *J. S. Salaman.*

Solicitors for Defendants: *Wright & Pilley.*

C. A.

1877

May 10.

Ex parte DRAKE. *In re* WARE.

Action of Detinue—Judgment for Plaintiff—Execution levied after Notice of Bankruptcy of Defendant—Property in detained Chattel—Chattel in Possession of Trustee—Forcible Seizure by Plaintiff—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 78—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 19.

Judgment for the Plaintiff in an action of detinue held not to change the property in the detained chattel until satisfaction of the value found by the judgment; even though satisfaction was prevented by the bankruptcy of the Defendant.

Brinsmead v. *Harrison* (1) followed.

The Plaintiff was entitled to apply to the Court of Bankruptcy for an order upon the trustee to deliver up the chattel to him.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, sitting as Chief Judge in Bankruptcy.

In March, 1875, *James Ware*, a carrier and carman, hired a grey mare of *Daniel Drake*. He neglected to return the mare when required by *Drake* to do so, and in May, 1876, *Drake* commenced an action in the Exchequer Division against *Ware* for the recovery of the mare. The action was tried on the 2nd of December, 1876, when a verdict was found for the Plaintiff for £60, the value of the mare, such amount to be reduced to 1*s.* if the mare was returned to the Plaintiff on the 4th of December, and £25 damages for the wrongful detention. And the Judge directed judgment for £85, and the costs of the action. The Defendant did not return the mare, and on the 6th of December, the Plaintiff's solicitor's bill of costs was taxed at £70 10*s.* 2*d.* At an earlier hour on the same day *Ware* had filed a liquidation petition, and notice of the petition was given to the Plaintiff's solicitor by *Ware's* solicitor when they attended the taxation. On the same day *Drake* signed judgment in the action for £155 10*s.* 2*d.*, and issued and lodged with the sheriff of *Middlesex* a writ of *fi. fa.* on the judgment. On the 7th of December the sheriff levied on the goods of *Ware*, not including the mare. An order was afterwards made by the Court of Bankruptcy restraining the proceedings

(1) Law Rep. 6 C. P. 584; Ibid. 7 C. P. 547.

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under the execution, and the sheriff withdrew. The first meeting of the creditors was held on the 5th of January, 1877, when *Drake* tendered a proof. His affidavit stated the verdict in the action, the signing of judgment, the taxation of the costs, and that the mare had not been delivered to him, nor the £85, or the amount of the taxed costs paid to him. The affidavit went on to state that *Ware* was also, at the date of the institution of the liquidation proceedings, and still was, indebted to him in the sum of £264 for hire of the mare from the 25th of March, 1875, to the 2nd of December, 1876, for which sum he had not received any satisfaction or security. He further said that he had not received any satisfaction or security for the amount recovered by him under the judgment, except so far as the same was secured by the goods levied upon by the sheriff. This proof was objected to by the debtor, on the ground, as to the £264, that an action was pending in the Common Pleas Division by the debtor against *Drake*, in which *Drake* had set up a counter-claim for £100 for hire of the mare, upon which issue had been joined, and as to the costs claimed, on the ground that the judgment was not produced. This objection was marked on the proof and signed by the chairman at the meeting. *Drake* voted at the meeting. The proof was afterwards objected to by the trustee in the liquidation, as to the £264, on the ground that no contract for hire was ever entered into by the debtor. On the 10th of January, 1877, *Drake* applied to the Court in the liquidation for an order that the trustee should deliver to him the goods which had been seized by the sheriff, or that he should, out of the first assets belonging to the estate of *Ware* which should come to his hands, pay to *Drake* the £155 10*s.* 2*d.* due to him under the judgment, with interest until payment. This motion was by consent turned into a special case. Upon the hearing of the case on the 13th of February, the Registrar decided that *Drake* was not entitled to any relief. At this time *Drake* did not know where the mare was. But on the 13th of March he accidentally discovered her in the possession of the debtor, whose servant was driving her. The debtor was, with the permission of the trustee, using her in his business. *Drake* thereupon instructed the sheriff to seize the mare under the writ of *fi. fa.*, and the sheriff on the same day forcibly removed her

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from the debtor's possession. On the 14th of March the trustee obtained in the Court of Bankruptcy an interim injunction restraining the sheriff and *Drake* from selling the mare, and on the 27th of March the Registrar made this injunction perpetual, and ordered that the mare should be forthwith delivered up to the trustee.

Drake appealed.

Argument.

D. Kingsford, for the Appellant:—

The property in the mare remained in *Drake*. It was not divested by the judgment in the action, and nothing which he afterwards did under the judgment divested it: *Brinsmead* v. *Harrison* (1). As the execution was not satisfied the property remained in the Plaintiff: *In re Scarth* (2); and he had a right of recapture: *Blades* v. *Higgs* (3).

[JESSEL, M.R.:—It is clear, from what is said by *Willes*, J., in *Brinsmead* v. *Harrison*, that after the judgment in an action of detinue there is no right of action for the goods against a third party. If there be no right of action, what right have you to recover the goods by force?]

The Court of Bankruptcy has power to order the trustee to give up the mare, and that is what the Appellant asks. The proof does not stand in his way. It was really only a proof for the sum due for the hire of the mare; the reference to the judgment was only made by way of narrative. There was no attempt to prove for the judgment. And if there was, the proof was abandoned by the subsequent application for payment of the judgment debt and costs in full.

E. C. Willis, for the trustee:—

The Appellant had notice of the filing of the petition before he issued execution.

[JAMES, L.J.:—*Ware* had no goods then. The title of the trustee by its relation back deprived him of his property.

JESSEL, M.R.:—How is the trustee in any better position with

(1) Law Rep. 6 C. P. 584; Ibid. 7 C. P. 547.
(2) Law Rep. 10 Ch. 234.
(3) 10 C. B. (N.S.) 713.

regard to the mare than a third person who had no title whatever?

JAMES, L.J.:—If the debtor had no title the trustee has none.]

The Appellant elected to prove. In his affidavit he says that he has no security for the judgment, except the levy by the sheriff. That implies that the proof extends to the judgment.

[JAMES, L.J.:—He would have been entitled to prove for the costs at any rate.]

And moreover he voted. Then the order on the special case amounted to a finding that the trustee was entitled to dispose of the mare, and there was no appeal from that decision. *In re Scarth* (1) is in my favour. The issuing execution was an election to take the value of the mare in place of having her restored. The trustee is not a third party; he is a continuation of the existence of the debtor. He could plead the judgment just as the debtor could.

[JESSEL, M.R.:—After judgment in an action of detinue can the Plaintiff apply under sect. 78 of the *Common Law Procedure Act* to a Judge at Chambers for an order for delivery up of the chattel?

Kingsford:—Yes. The form of the writ of delivery is given in Appendix F. (No. 8), to the Rules of Court, 1875, under the Judicature Acts: *Wilson's* Judicature Acts (2).

JESSEL, M.R.:—The right of action is gone only because under the judgment the Plaintiff can obtain an order for the delivery up of the chattel.]

At any rate the mare was in the possession of the trustee, and it was a contempt of Court to take her away by force: *Ex parte Cochrane* (3). A trustee in bankruptcy is in the same position as a receiver of the Court of Chancery: *Bankruptcy Act*, 1869, s. 19.

[JESSEL, M.R.:—Only with relation to the property of the bankrupt.]

The Appellant ought to have applied to the Court.

(1) Law Rep. 10 Ch. 234. (2) Page 386.
(3) Law Rep. 20 Eq. 282.

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Kingsford, in reply:—

It was by a mere accident that the Appellant found out where the mare was. The debtor's servant was driving her. The sheriff's officer happened to be close at hand, and the Appellant was thus able to stop the mare *in transitu*. If he had not done this, most probably he would never have got her back at all.

Judgment, Jessel, M.R.

JESSEL, M.R.:—

The first question which we have to decide is one which is simple enough to state—in whom was the property in this grey mare at the time when she was taken possession of by the sheriff? The property was originally in *Drake*. She had been hired from him by *Ware*, the liquidating debtor. The hiring was put an end to; the debtor was requested by *Drake* to return her, and he failed to do so. The action of detinue was brought by *Drake*, and he recovered judgment in the ordinary form. After that the Plaintiff issued execution on his judgment, but the execution was defeated by the prior act of bankruptcy which overrode it, so that the Plaintiff got nothing by his execution. After the filing of the liquidation petition he took in what has been called a proof for the judgment debt and the costs of the action. Some time after this he accidentally saw the mare in the possession of the debtor's servant, and he directed the sheriff's officer to seize her under the old writ. This was not a proper mode of proceeding. The trustee then obtained from the Registrar the order for an injunction, and for the delivery of the mare to him; and from that order the appeal is brought. The first question is, in whom was the property in the mare when she was seized by the sheriff's officer? I am of opinion that, after the decision in *Brinsmead* v. *Harrison* (1), we are bound to hold that the property was never divested from *Drake*. He had the property unless something which he did under the judgment divested it from him. It is clear that the judgment itself did not divest the property. Did the execution divest it? Upon that question the authority of *Brinsmead* v. *Harrison* is distinctly in point. It shews that the execution does not divest the property unless there is satisfaction of the judg-

(1) Law Rep. 7 C. P. 547.

ment. There are several ways in which an execution might produce nothing. One way would be if the amount produced by the sale of the goods seized did not cover the expenses of the sale. Another way would be if, as happened in the present case, there was a prior act of bankruptcy which nullified the execution. The judgments in *Brinsmead* v. *Harrison* (1), and especially that of Mr. Justice *Willes*, shew that the theory of the judgment in an action of detinue is that it is a kind of involuntary sale of the Plaintiff's goods to the Defendant. The Plaintiff wants to get his goods back, and the Court gives him the next best thing, that is, the value of the goods. If he does not get that value, then he does not lose his property in the goods. On the appeal to the Exchequer Chamber, in *Brinsmead* v. *Harrison*, the only two Judges who expressed any opinion on the point confirmed the view of Mr. Justice *Willes*. Mr. Justice *Blackburn* said (2): "I observe that the Court of Common Pleas, in their judgment upon the demurrer to the new assignment, which is not now before us, held that by the recovery in the first action without satisfaction the property in the chattel did not pass. I should be inclined to agree to this, but it is unnecessary to express an opinion upon it." And Mr. Justice *Lush* said (3): "The Judges who decided those American cases seem to have thought that, by holding that recovery against one of two wrongdoers was a bar to an action against the other, they would be deciding that the property in the chattel passed by the recovery; but I do not think that by any means follows; and, as at present advised, I am prepared to adhere to the judgment of the Court below upon both points." Therefore one Judge entirely agreed with Mr. Justice *Willes*, and the other was inclined to agree with him. Under these circumstances we must consider it established that the property in the mare remained in the Plaintiff *Drake*. That being so, he had a right to obtain possession of his property either by taking it peaceably or by means of proper legal process. As I understand the provisions of sect. 78 of the *Common Law Procedure Act*, 1854, the Plaintiff (assuming that there had been no liquidation petition), if the value of the mare had not

(1) Law Rep. 7 C. P. 547. (2) Law Rep. 7 C. P. 554.
(3) Law Rep. 7 C. P. 555.

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been paid to him under the judgment, and if he could have found out where the mare was, might have applied to a Judge at Chambers for an order that the Defendant should deliver her to him. The liquidation petition prevented him from doing that, but the power of the Judge at Chambers became then vested in the Court of Bankruptcy, which could do complete justice in the matter. The Plaintiff *Drake*, therefore, if he had applied to the Court of Bankruptcy, might have obtained an order for the delivery of the mare to him. But it is said that he cannot do this now, because he is bound by the proof which he made in the liquidation. If that means anything it means this, that the Plaintiff has deliberately elected to take his chance of a dividend in the liquidation in substitution for his right to recover possession of his mare. It would be very extraordinary if he had done this, but of course it is possible that he may have done it, and we must examine what he actually did in order to see whether he has really made this election. He has done nothing beyond bringing in a proof. The proof has not been formally admitted by the trustee, though, on the other hand, it has not been rejected. But, before a reasonable time had elapsed after the proof was taken in, the Plaintiff made a claim to be paid in full the whole amount of his judgment, that is, he made a claim for the full value of the chattel. This was a proceeding wholly inconsistent with the notion that he had finally elected to take the dividend instead of the mare, and I am of opinion that he had made no such election. The result is that the order of the Registrar must be discharged, and we must now make the order which he ought to have made, that is, that the mare be delivered to or retained by the Appellant. But, inasmuch as his proceedings in directing the sheriff to seize the mare were not such as can be viewed with approbation by the Court, the proper order as to costs will be that there be no costs on either side, either of the hearing before the Registrar or of the appeal.

James, L.J.

JAMES, L.J.:—

I am of the same opinion. I think it is not the business of any Court of Justice to find facilities for enabling one man to steal

another man's property. That is really what we are asked to do by the Respondent. The Appellant desired to get his mare back. He brought his action of detinue, and he obtained a judgment, the effect of which was that the Defendant was to pay the value of the mare or give her up. The trustee seems to think that because the Defendant has become bankrupt, he can keep the value and not give up the animal. It is impossible to hold that that can be right, and I am very glad to find that we have the authority of the Courts of Common Pleas and Exchequer Chamber for saying that such is not the state of the law of *England*. I agree also with the Master of the Rolls that in the present case there has been no election by the Appellant to take a dividend in lieu of his judgment. A man does not elect himself out of his property in this sort of way. I agree also that the sheriff ought not to have been put in motion to take the mare away from the trustee, who, rightly or wrongly, had got possession of her. But for this improper act the Appellant will be sufficiently punished by losing all his costs.

BAGGALLAY, L.J., concurred. Baggallay, L.J.

Solicitor for Appellant: *W. Eley.*
Solicitor for Trustee: *J. P. Poncione, Jun.*

Ex parte MARSHALL. *In re* MARSHALL.

Debtor's Summons—Application to dismiss—Security—Discretion of Judge—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 7.

A creditor issued a debtor's summons for £442, the alleged balance of an account for goods supplied. The creditor had previously brought an action and had issued another debtor's summons against the alleged debtor for the same sum. The action had been by consent dismissed for want of prosecution, and the summons had been also dismissed. The debtor applied to the Court to dismiss the second summons, and made an affidavit that he was not indebted in the sum claimed. On the hearing of the application, the proceedings in the action and on the first debtor's summons were put in evidence. The debtor was not examined, and no other evidence was adduced on his behalf. The creditor was examined and cross-examined, and stated that he had made many applications during several years to the debtor for payment,

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and had been put off with excuses. The Registrar held that the debtor must give security for the alleged debt and costs, pending the trial of an action to establish the validity of the claim, and the decision was affirmed by the Chief Judge:—

Held, that the Registrar was right in requiring security, there being ground for suspecting the solvency of the debtor.

In determining whether security ought to be given upon an application to dismiss a debtor's summons, regard must be had to the question of the debtor's solvency, as well as to the possibility of his establishing his defence.

The requiring of security being, however, a matter of judicial discretion, the Court of Appeal will not interfere with the exercise of the primary Judge's discretion unless it can see clearly that the discretion has been improperly exercised.

Statement.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

Matthew Marshall was a tallow chandler at *Newcastle-on-Tyne*. During the years 1868 to 1871 *Robert Rowley*, a butcher at *Newcastle*, supplied him with tallow from time to time. On the 18th of September, 1876, *Rowley* commenced an action against *Marshall* in the Exchequer Division of the High Court (in the *Newcastle* District Registry) to recover £484 15*s.* 10*d.*, the balance alleged to be due from *Marshall* for the tallow supplied, the writ being specially indorsed. On the 23rd of September *Marshall* appeared to the writ and stated in his appearance that he required a statement of claim to be delivered. *Rowley* issued a summons to set aside the appearance, on the ground that he believed that the Defendant had no defence to the action, and that the appearance had been entered for the purpose of delay. *Marshall* filed an affidavit in which he said that he had had no further particulars of the Plaintiff's claim than those indorsed on the writ, and that he had made no payment to the Plaintiff since the 31st of July, 1871, when he paid him £50, and from that time until the 15th of September, 1876, he had had no claim made upon him by the Plaintiff. He said also that he was advised and believed he had a good defence to the action on the merits, and that he had appeared, not for the purpose of delay, but because he was not indebted to the Plaintiff in any sum whatever. In answer to this, *Rowley* made an affidavit, in which he said that the payment of £50 on the 31st of July, 1871, was a payment on account, and that since that date he had had subsequent weekly dealings with

Marshall by supplying him with tallow; that *Marshall* had received two separate accounts from him since the payment of the £50, and had paid a further sum of £20 on account. *Rowley* went on to say: "The transactions between us took place weekly, and on delivery of each quantity of tallow the Defendant signed what is called a 'tallow note,' acknowledging to have received the quantity therein specified, and I have supplied the Defendant with tallow up to the latter part of 1871. I have over and over again called upon the Defendant personally at his place of business, and made other applications by letter, but have always been put off with the excuse that his books were in a state of confusion, and he begged for time that he might get them put into order. Consequently I have refrained up to the present time from taking proceedings to recover the amount due to me." The District Registrar (who was also Registrar of the County Court) refused to set aside the appearance. On the 25th of October the Defendant took out a summons to shew cause why the Plaintiff should not deliver further and better particulars of his claim, and on the 27th of October the Registrar made an order that the Plaintiff should deliver further particulars within seven days. The Plaintiff did not deliver these particulars, and he never delivered a statement of claim. On the 12th of February, 1877, the Defendant took out a summons to dismiss the action for want of prosecution, and on the 14th of February an order was by consent made accordingly. In January, 1877, *Rowley* issued a debtor's summons in the *Newcastle* County Court against *Marshall* for £442, which he then alleged to be the balance due to him. *Marshall* applied to have this summons dismissed, and on the hearing of the application the Registrar of the County Court was informed that no proceedings had been taken to enforce the claim until the action was commenced in September, 1876, and that the action was in abeyance, no statement of claim having been delivered. Upon these facts being stated to him, the Registrar dismissed the summons with costs. On the 13th of March, 1877, *Rowley* issued another debtor's summons against *Marshall* for the same sum of £442. The particulars of demand served with the summons purported to shew the quantities of tallow supplied by *Rowley* to *Marshall* from January, 1868, to November, 1871, and the respective dates of delivery. The total quantity stated to

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have been supplied was 3647 stones. The average price of tallow during the above period was stated to have been 4*s.* 0½*d.* per stone, thus making the price of the whole quantity supplied £737. From this was deducted £295 paid "by cash," leaving a balance of £442 due. *Marshall* applied to the County Court to dismiss the summons, and filed in support of his application an affidavit that he was not indebted to *Rowley* in the amount of the sum claimed in the summons.

The application was heard by the Registrar on the 26th of March. On the part of *Marshall* the proceedings in the action and the proceedings on the first debtor's summons were put in evidence. *Marshall* was not examined, and no other evidence was adduced on his behalf. *Rowley* was examined and cross-examined. In the course of his examination he said that on the 25th of January, 1875, he supplied *Marshall* with a copy of the particulars. He also said: "When I have delivered an order, I have seen an entry of it made in *Marshall's* books. I seldom went with the tallow myself. I called upon *Marshall* between 1870 and April, 1876, hundreds of times. I always received excuses. On the 19th of April, 1876, I delivered another copy of the account; he said he had lost the other one. On the 26th of April, 1876, I received £20 from *Marshall*. After giving credit for this £20 and previous payments given credit for in the account furnished to *Marshall*, £442 is now due to me." In cross-examination he said: "There were no prices agreed upon between us. I have taken the average price during the whole of the time I have supplied the goods. I called between November 1871 and 1876 many times with a copy of the account in my pocket. I did not make out my account earlier, because I frequently called and requested *Marshall* to state the account and settle with me." The Registrar ordered that *Marshall* should deposit in Court £442 within fourteen days, as security for the payment of what might be recovered by *Rowley* in any proceedings taken by him against *Marshall* for the £442, together with £70 as security for costs, and that all proceedings on the summons should be stayed until the Court in which proceedings should be taken should have come to a decision thereon. *Marshall* appealed to the Chief Judge. The appeal was heard on the 7th of May, 1877.

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De Gex, Q.C., and *Creed*, for the Appellant, cited *Ex parte Latham* (1).

Finlay Knight, for *Rowley*, was not called upon.

BACON, C.J., declined to interfere with the discretion of the Registrar, and dismissed the appeal with costs.

Marshall appealed to the Court of Appeal. The appeal was heard on the 31st of May, 1877.

Argument.

De Gex, Q.C., and *Creed*, for the Appellant:—

Security ought not to have been required. The summary procedure on a debtor's summons ought not to be permitted where the alleged debt was contracted so long ago, and the creditor allowed the action which he had commenced to be dismissed for want of prosecution. The Registrar, by refusing to strike out the Defendant's appearance in the action, in effect allowed him to defend without giving security. He must have been satisfied under Rules of Court, 1875, Order XIV., rule 1, that there was a good defence. Why should the creditor be allowed to obtain security in another way? *Ex parte Latham* shews that in such a case security ought to be refused. *Ex parte Rowan* (2), *Ex parte Lowenthal* (3), and *Ex parte Wier* (4), are authorities substantially to the same effect. The price of the goods had not been fixed, and it was not shewn that reasonable efforts had been used to obtain payment. If proceedings of this kind are to be permitted, a man may make any demand he pleases and obtain security for its payment. *Marshall* was not called as a witness, because he had made the statutory affidavit and relied upon the dismissal of the action and of the first debtor's summons, as well as upon the decision in *Ex parte Latham*. The question had really been already tried on its merits in the action and on the first summons.

[JESSEL, M.R.:—Under Order XIV., rule 1, the only question which can be tried is whether the Judge is satisfied that there is a good defence on the merits. Upon a debtor's summons it is the

(1) 4 Ch. D. 105.
(2) Law Rep. 9 Ch. 617.
(3) Law Rep. 9 Ch. 324, 329.
(4) Ibid. 7 Ch. 319.

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Argument.

duty of the Judge to consider also the question of the debtor's solvency.]

There is no imputation of insolvency here.

[JESSEL, M.R.:—It is not disputed that some debt is due. Applications for payment were made in 1875 and 1876, and the creditor was put off with excuses. Surely it is not an unreasonable inference that there was insolvency.]

Rowley's own evidence shews that he did not know the amount due without the assistance of *Marshall*, and his account does not shew the price.

[JESSEL, M.R.:—He has given evidence how he makes out his claim, and he is not contradicted.]

Finlay Knight, for *Rowley*, was not called upon.

Judgment, Jessel, M.R.

JESSEL, M.R.:—

In this case the Registrar in the first instance, and the Chief Judge in Bankruptcy in the second instance, in the exercise of the judicial discretion reposed in them, have decided that security should be given by the alleged debtor for the debt and costs as a condition of his being at liberty to defend an action. No doubt the Court of Appeal can, if it thinks fit, reverse the decision so come to, but, before interfering with the exercise of a judicial discretion, the Court must be satisfied, not merely that it would itself have arrived at a different conclusion in the first instance, but that the discretion has been clearly improperly exercised.

Now the facts in evidence before us are few and simple. The substance of them amounts to this: that a butcher supplied large quantities of tallow—the particulars of which are stated in detail in the written account long since delivered—to a tallow chandler. The details of the account do not appear to be in any way disputed. The goods were delivered without the price being fixed at the time of the delivery, but the market price of tallow was well known, and, calculating the value of the tallow at a fair average price, the butcher makes out that the tallow chandler owes him £442. It appears in the evidence that the butcher applied hundreds of times afterwards for payment; that he ob-

tained only one small payment on account, and that, although he applied those hundreds of times for payment, he did not get the money; and that since the year 1871, with the exception of one payment of £20, he has obtained nothing. It also appears that in answer to his applications he was put off by excuses, and that he then brought an action. It appears to me that the tallow chandler, not having ventured to go into the box, not having put in any answer to the butcher's statement upon oath, must, upon the present materials, be taken to have no defence, or no substantial defence, to the action. That decides the first point.

The second point which has been pressed upon us, and which no doubt is a very proper point for consideration by the Judge who has to decide a question of security, is whether in these proceedings in the Court of Bankruptcy there should not be some security given for the debt, so that if the Plaintiff recovers judgment in the action he shall not remain unpaid, as he might do if no security was given. If no security were given, the creditor might possibly go without the fruits of his judgment in the shape of any payment. I think we ought not to criticise very closely what the amount of evidence should be. If the Judge sees that the creditor has applied hundreds of times for payment during an interval of five years, and that for the last two years and a half he has received nothing whatever, but has been put off with excuses, I think there is some ground for supposing that without security the Plaintiff might recover judgment, but that nothing in the shape of pecuniary benefit would ever accrue to him from the judgment so recovered. That being so, I cannot say that the decision of the Registrar, affirmed as it was by the Chief Judge, is so irrational, that it draws an inference so absurd from the evidence, that I must assume that this man is not only solvent, but, as his counsel has put it, beyond question wealthy, and well able to pay the money. I think there was some evidence of insolvency, and that, the discretion having been exercised as it has been by the Registrar and by the Chief Judge, there is no ground for the Court of Appeal to disturb the decision arrived at.

LORD COLERIDGE, C.J.:—

Lord Coleridge, C.J.

I am of the same opinion.

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Judgment, Baggallay, L.J.

BAGGALLAY, L.J.:—

By the 7th section of the Act it is left to the discretion of the Judge, upon the return of a debtor's summons, to determine whether security shall be given for the debt which forms the subject of the summons. The exercise of that discretion is, no doubt, an important matter to be considered, but having regard to the advantages which the Judge of first instance has in seeing the witnesses, who are examined before him, and thus of forming a correct judgment upon the case, the Court of Appeal ought not lightly to interfere with the exercise of his discretion, and the mere feeling on the part of an Appellate Judge that, if he had been called upon in the first instance to decide the case, he might have come to a different conclusion, is not, in my opinion, a sufficient reason for reversing the decision first come to.

And, if that applies to the case of a first appeal, it must apply with still greater force to a case where the decision of the Judge of first instance has been affirmed by the Chief Judge. It would require a strong case to induce a Judge of Appeal to reverse a decision upon a matter of discretion, and still more so where the exercise of that discretion has been affirmed by another Judge. So far from there being such a case in the present instance, it appears to me that everything tends to shew that the discretion has been well exercised. There does not appear to have been any material denial of what was stated by the creditor when he was examined before the Registrar as to the quantity of tallow supplied, or that the amount due was correctly estimated according to the ordinary market value.

The appeal was dismissed with costs.

Solicitor for Appellant: *G. B. Wheeler*, agent for *H. S. Sewell, Newcastle-on-Tyne.*

Solicitors for Respondent: *Doyle & Sons*, agents for *W. J. Johnston, Newcastle-on-Tyne.*

In re GIST (A PERSON OF UNSOUND MIND).

C. A. 1877 June 4.

Lunatic—Permanent Improvements—Mortgage of Lunatic's Estate—16 & 17 Vict. c. 70, s. 118.

Repairs and permanent improvements to a large amount upon an estate of which a lunatic was tenant in tail in possession were found to be expedient. There was in Court a sufficient fund of personalty to which the lunatic was absolutely entitled, and his income was much more than sufficient for his requirements. The amount required for repairs and improvements was ordered to be raised by mortgage or charge of the settled estate.

Statement.

THE lunatic in this case was tenant in tail in possession of estates in the counties of *Gloucester*, *Worcester*, *Oxford*, *Warwick*, and *Northampton*, producing an income of between £6000 and £7000. He was also absolutely entitled to an estate called the *Alston* estate, which had been purchased out of accumulations of income, to £19,534, consols in Court in the lunacy, and to £2821, consols in Court. The latter sum represented the proceeds of timber felled on the estates. A further sum of £1500 was expected shortly to come in from the same source. The excess of income above expenditure was about £3400 a year. The lunatic had not any child.

The property having fallen into a bad state of repair, a survey was directed, and it appeared that it was desirable to effect repairs and permanent improvements on the estates to the amount of £13,000, and the Master by his report approved of this expenditure.

A petition was now presented by the committee of the person and estate, asking that the report might be confirmed, and that the amounts which the Master should from time to time certify to be payable in respect of the repairs and improvements might be raised and paid out of the funds in Court, or be raised by a mortgage or charge of the real estate of which the lunatic was tenant in tail.

Argument.

J. T. Humphry, for the Petitioner.

Cookson, Q.C. and *W. S. Owen*, for the next of kin, submitted

C. A. 1877 — *In re* GIST (A PERSON OF UNSOUND MIND).

that, having regard to the extensive character of the repairs and improvements, they ought to be raised by mortgage of the settled estates, and not paid out of the funds belonging to the lunatic: 16 & 17 Vict. c. 70, s. 118; *Ex parte Annandale* (1); *Ex parte Grimstone* (2); *In re Pares* (3).

Argument.

Bush, for the heir-at-law, who was also next in remainder under the limitations of the settlement creating the estate tail, contended that the expenses ought to be paid out of the accumulations of rents, and that at all events the timber money ought to be first applied.

Judgment.

BAGGALLAY, L.J.:—

I am clearly of opinion that under sect. 118 there is jurisdiction to order such of these expenses as relate to the settled estate to be raised by mortgage or charge of that estate, and under the circumstances of the case I think that the most reasonable course. The repairs and improvements on the *Alston* estate, of which the lunatic is owner in fee, will be paid for out of the personalty.

Solicitors: *J. Neal; Belfrage & Middleton; Iliffe & Co.*

C. A. 1877 — *June* 14, 15.

Ex parte REDDISH. *In re* WALTON.

Appeal—Right of Appellant to raise a New Case—Rules of Court, 1875, *Order* LVIII., *rr.* 2, 5—*Fraudulent Preference.*

14 Ch. D. 4.

An Appellant is not entitled to raise upon his appeal a new case inconsistent with that which he originally raised in the primary Court, even though the evidence taken in that Court supports the new case.

Circumstances amounting to fraudulent preference considered.

The decision of *Bacon*, C.J., affirmed.

Statement.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

Jonathan Walton was a cattle dealer at *Alston*, in *Cumberland*. He kept a banking account with the *Alston* branch of the *Carlisle and Cumberland Banking Company*. On the 1st of May, 1876, he

(1) Amb. 80. (2) Amb. 706.

(3) 2 Ch. D. 61.

(4) See 11 Ch (1875) N.S. II 362, 363.

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Statement.

filed a liquidation petition in the *Carlisle* County Court, under which *James Reddish* was appointed trustee. He, on the 6th of August, 1876, gave notice to the bank of an application to the Court for a declaration that a payment of £2466 18*s.* 8*d.*, made by the debtor to the bank on the 26th of April, 1876, was void, as being a fraudulent preference, and for an order that the bank should repay the amount to the trustee.

The debtor's account with the bank had been for some time overdrawn to the extent of more than £2000, but the bank held as security for the overdraft the promissory notes of three sureties to the amount of £1800. One of the promissory notes was given by Mr. *Millican*, the manager of the *Alston* branch of the bank, for £600. In February, 1876, the bank had requested *Walton* to reduce his account to £1800, and he had promised to do so, but had not kept his promise. On the 24th and 25th of April there was a cattle fair held at *Penrith*, and prior to and in contemplation of that fair *Walton* had purchased a number of cattle from various farmers, but had not paid for them. He took the cattle thus purchased to the fair, and there sold them, receiving in payment various cheques and bills amounting altogether to £2466 18*s.* 8*d.*, and he then gave the vendors of the cattle cheques on his own bank in payment of the price of the cattle. On the morning of the 26th of April, before any of those cheques had been presented for payment, the balance to his debit at the bank was £2424 6*s.* 8*d.* Some of those cheques (to the amount of about £1200) were sent by post to the bank at *Alston* for payment, and the letters containing them were delivered on the 26th of April. About half-past nine in the morning of that day *Millican* had an interview with *Walton*, and told him that he must pay in all he could, and *Walton* promised to pay in the money he had received at the fair in the course of the day. He had not, however, done so before the bank closed at 3 P.M., and *Millican* went to his house again about half-past four in the afternoon, and then succeeded in obtaining from him the £2466 18*s.* 8*d.*, which was carried to his credit in the bank books the next day. Before, however, this interview took place *Millican* had written letters for the post (which were afterwards posted), returning the cheques for £1200, and refusing to pay them, on the ground that the bank

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Statement.

had no assets of *Walton*. But he did not at the interview tell *Walton* that this had been done, or inform him that the bank would not go on honouring his cheques. The same evening, after the interview, *Millican* wrote *Walton* a letter, in which he said: "Your cheques of to-day are all returned. We cannot honour any more of your cheques unless you provide for them." In consequence of this *Walton* was compelled to stop, and filed his petition on the 1st of May.

The Judge of the County Court held that the payment was a voluntary one to the extent of the £1800 for which the bank held security, and ordered the bank to repay the £1800. The bank appealed to the Chief Judge.

The appeal was heard on the 23rd of April, 1877.

Winslow, Q.C., and *Creed*, for the bank.

J. Brown, Q.C., and *Reginald Brown*, for the trustee.

BACON, C.J., held, upon the evidence, that the whole of the payment was valid, and discharged the order of the County Court Judge.

The trustee appealed. The appeal was heard on the 14th and 15th of June, 1877.

Argument.

Reginald Brown (*J. Brown*, Q.C., with him), for the Appellant:—

The evidence shews that the payment, at any rate *ultra* the sum required to reduce the overdraft to £1800, was voluntary. But, even if it was made under pressure, the evidence shews that it was really made on the faith of an express or implied representation on the part of the bank manager that the money would be applied to meet the cheques which *Walton* had drawn. The money was therefore obtained by a fraud or misrepresentation by the bank manager, and the bank ought on this ground to be compelled to refund it.

Winslow, Q.C., and *Creed*, for the bank:—

It is enough that the manager asked for payment. If there was

a mixed motive for making the payment it is valid: *Ex parte Topham* (1); *Brown* v. *Kempton* (2). If the payment was made in consequence of any pressure, however slight, or if it was made in the expectation that the bank would honour the debtor's cheques, that is enough to make the payment valid. It was clearly not a voluntary payment. The old cases as to pressure apply since the passing of the Act of 1869: *Ex parte Tempest* (3); *Butcher* v. *Stead* (4). There was no appropriation by the debtor of the money to meet his own cheques. It was paid in the ordinary course of business, and the banker's general lien attached to it when paid.

Reginald Brown, in reply:—

[JAMES, L.J.:—The difficulty in your way is this: If you make out that any fraud was committed on *Walton*, in so doing you negative the proposition that there was a fraudulent preference on his part. And fraudulent preference was the only point raised in the County Court.]

Now that appeals are brought by way of rehearing, the whole case is open upon an appeal, and the Court of Appeal can do anything which the Court of first instance might have done: Rules of Court, 1875, Order LVIII., rules 2, 5. Even if we raise alternative inconsistent cases, the Court can investigate the whole matter: *Bankruptcy Act*, 1869, ss. 71, 72.

[JAMES, L.J.:—The case must be one which was raised originally.

BAGGALLAY, L.J.:—No suggestion was originally made of a fraud having been committed on the debtor.]

The practice on bankruptcy appeals is now regulated entirely by the *Judicature Act* and Rules: *Ex parte Viney* (5).

[JAMES, L.J.:—That case depended upon the special provision of rule 9 of Order LVIII., as to the time within which bankruptcy appeals are to be brought. You cannot upon a rehearing raise a

(1) Law Rep. 8 Ch. 614.
(2) 19 L. J. (C.P.) 169.
(3) Law Rep. 6 Ch. 70.
(4) Ibid. 7 H. L. 839, 846.
(5) 4 Ch. D. 794.

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case totally inconsistent with and contradictory to your original case.]

Judgment, James, L.J.

JAMES, L.J.:—

I am disposed to think that the mode in which this money was obtained cannot be exactly approved of, and that the bank manager ought to have told the debtor that his cheques had been really already dishonoured. But that is an entirely different case from the case which was at first raised, which was that there had been a fraudulent preference on the part of the debtor, and not that there had been a wrong committed against him, which rather seems to be the case made out by the evidence. If the money was obtained by anything like a wrong or a fraud upon the debtor, it is possible that an action may lie against the bank to recover it. But that question is not before us now, and I do not wish to encourage further litigation.

His Lordship added that, unless the former decisions were to be overruled, it was clear upon the evidence that there was sufficient pressure to negative the notion that there was any fraudulent preference. The decision of the Chief Judge must, therefore, be affirmed.

Baggallay, L.J.

BAGGALLAY, L.J.:—

I think that upon the evidence there is no ground whatever for saying that there was a fraudulent preference. I do not think that we can now go into the case of fraud or misrepresentation which has been suggested in the argument before us.

Bramwell, L.J.

BRAMWELL, L.J.:—

I am sorry that I am obliged to come to the same conclusion, for I have a strong impression that in point of law, and at any rate morally, the bank are not entitled to keep this money. But we have not that case before us. The only case before the County Court Judge was one of fraudulent preference. The evidence shews that there was pressure, and the more strongly one feels that there was anything like fraud on the part of the bank, the more strongly must one be convinced that there was no fraudulent pre-

ference on the part of the debtor. I think the decision of the Chief Judge was right, and that the appeal must be dismissed with costs.

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Solicitors for Trustee: *Linklater, Hackwood, & Co.*, agents for *Wright & Brown, Carlisle.*

Solicitor for Bank: *G. B. Wheeler*, agent for *H. S. Sewell, Newcastle-on-Tyne.*

UNGLEY *v.* UNGLEY.

C. A. 1877 *June* 19.

[1875 U. 25.]

Specific Performance — Statute of Frauds — Part Performance — Possession — Consideration of Marriage.

A father verbally promised, in consideration of his daughter's marriage, to give her a house as a wedding present, and immediately after the marriage he put the daughter and her husband into possession. The father was then the owner of the house, which was leasehold and was subject to a charge in favour of a building society, payable by instalments. The father paid the instalments which fell due during his lifetime, and at his death there remained a balance of £110, which fell due shortly afterwards:—

Held (affirming the decision of *Malins*, V.C.), that the verbal promise to give the house having been established, the possession took the case out of the *Statute of Frauds;* that the contract was to give the house free from incumbrances; and that the £110 was payable out of the father's estate.

Statement.

THIS was an appeal from a decision of Vice-Chancellor *Malins* (1).

The suit was instituted for the administration of the estate of *William Ungley*, who died intestate on the 10th of August, 1875.

The intestate's personalty was estimated at about the value of £1260, including a leasehold house in which he carried on his business, and another in *Westbourne Road, Barnsbury*, which he acquired as a member of the *Clerkenwell Bowkett Building Society* in 1871.

He left one son, the Plaintiff *William Henry Ungley*, who took out letters of administration, and one daughter, *Margaret Kendall*, the wife of *Richard John Kendall.*

Mr. and Mrs. *Kendall* claimed the house at *Barnsbury* as having been a gift from Mrs. *Kendall's* father on her marriage.

(1) 4 Ch. D. 73.

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She and her husband stated in their answer that in October, 1871, the intestate informed them that he had bought the house in question, which should, in the event of their marriage taking place, be his wedding present to his daughter, and that they were to take possession of it as soon as the marriage should be solemnized.

The intestate had, in fact, before that time acquired the lease of the house subject to the payment to the *Bowkett Building Society* of instalments on the money advanced for it as they became due, these instalments being secured in the usual way, by a mortgage of the house.

Immediately upon the marriage, which took place on the 16th of December, 1871, Mrs. *Kendall* and her husband entered into possession of the house, having placed therein their own furniture, and they continued in occupation till the intestate's death, the husband paying the ground rent and rates and taxes. There was, however, evidence that on some occasions, if not always, *W. Ungley* supplied him with money for that purpose.

Some of the instalments of the purchase-money fell due during the intestate's lifetime, and he regularly paid them. At his death there remained a sum of £110 still to be paid, which had since fallen due.

The answer also stated that Mr. *Kendall* had applied to the intestate to complete the gift by executing an assignment of the house to his daughter, and that he had declined to do so then, but expressed his intention of making the assignment when all the instalments were paid. The answer claimed to have the gift completed and to have the £110 paid out of the personal estate, and if that were insufficient, out of the realty, and to have an assignment made to or for the benefit of Mrs. *Kendall*.

Both parties went into evidence, and the witnesses were examined before the Vice-Chancellor.

The evidence of the Defendants' witnesses generally supported the case made by the answer. In particular, Mr. *Hayes*, the lessor of the house, stated that the intestate had told him at the time when he took the lease that he wished to purchase a house for his daughter on her marriage.

On the part of the Plaintiff evidence was given of statements

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by the intestate importing that he intended to make an equal division of his property amongst his widow and two children.

Vice-Chancellor *Malins* was of opinion that the promise by the intestate had been proved, and made an order that the Plaintiff should assign the lease of the house to Mrs. *Kendall*, and should pay the £110 due to the building society out of the intestate's personal estate.

From this decision the Plaintiff appealed.

Argument.

Glasse, Q.C., and *Russell Roberts*, for the Plaintiff:—

There is no clear evidence of any promise having been made by the intestate to give the house to Mr. and Mrs. *Kendall*. The statement made by the Defendants is contradicted by the evidence of declarations made by the intestate in his lifetime.

[JESSEL, M.R.:—Such declarations cannot be evidence against the Defendants.]

Allowing that there is evidence of some verbal promise, we rely upon the *Statute of Frauds* as precluding the Defendants from setting it up. They allege that there has been part performance of the promise. But the marriage is in itself no part performance: *Caton* v. *Caton* (1); and the fact of possession is not part performance in such a case as the present. In the first place, it is quite consistent with a mere license to live there during their life or during pleasure, and is, therefore, no evidence of a promise to give them the house. In the second place, possession is only held to be part performance at the suit of the person who gives the possession. For the ground of relief in such cases is that the party seeking relief has been put into such a position by the part performance that it is against equity to insist on the statute: *Lester* v. *Foxcroft* (2); *Morphett* v. *Jones* (3); *Coles* v. *Pilkington* (4); *Attorney-General* v. *Day* (5). At all events, the Respondents are not entitled to have the £110 still due to the building society paid out of the intestate's estate.

(1) Law Rep. 2 H. L. 127.
(2) 1 Wh. & T. L. C. 3rd Ed. p. 693.
(3) 1 Sw. 172.
(4) Law Rep. 19 Eq. 174.
(5) 1 Ves. Sen. 218.

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J. Pearson, Q.C., and *Speed*, for Mr. and Mrs. *Kendall*, were not called on.

E. B. Michell, for the widow.

Judgment, Jessel, M.R.

JESSEL, M.R.:—

This is an appeal from a decision of Vice-Chancellor *Malins*, and two questions arise on the appeal, one of law and one of fact.

First, as to the question of law. A man, in consideration of the marriage of his daughter, promises his intended son-in-law that he will give his daughter a particular house on her marriage as a wedding present. This promise he makes orally without writing; and immediately after the marriage he puts his daughter and son-in-law in possession, and they remain in possession till the death of their father. The father dies intestate, and it is now objected by his administrator that by reason of the *Statute of Frauds* all that goes for nothing, and that they must give up the house. I am of opinion that that is not the law. The law is well established that if an intended purchaser is let into possession in pursuance of a parol contract, that is sufficient to prevent the *Statute of Frauds* being set up as a bar to the proof of the parol contract. The reason is that possession by a stranger is evidence that there was some contract, and is such cogent evidence as to compel the Court to admit evidence of the terms of the contract in order that justice may be done between the parties. In the present case it is quite clear that the Defendants were put into possession of the house in pursuance of some contract, and the only other question is one of fact, namely, what were the terms of the contract.

Before considering the evidence I must make this preliminary observation: that the Vice-Chancellor had the advantage, which we have not had, of hearing the evidence given and seeing the demeanour of the witnesses. In such a case the decision of a Judge on a question of fact ought not to be overruled by a Court of Appeal on light grounds. I do not say that we ought to shrink from doing so in a proper case, but very strong grounds must be shewn. On the particular question in the present case,

having read the evidence which was given before the Vice-Chancellor, my opinion is that it has been proved that there was a promise—not a mere expectation, but an actual promise—to give the house. The son-in-law swears so distinctly, and it is confirmed by the independent testimony of Mr. *Hayes*, the landlord of the house, a perfectly unprejudiced witness, who says that Mr. *Ungley* told him for what purpose he wanted the house, namely, that he was anxious to purchase a house for his daughter on her marriage. Then it is proved that he let his daughter and her husband into possession immediately on their marriage, and that he said he would not pay any more ground rent or insurance, because his son-in-law was to pay them. There is no evidence on the other side in contradiction of this. There is no question here between two agreements; the Appellant does not allege any other agreement in opposition to that contended for by the Respondents. The evidence for the Respondents is therefore substantially uncontradicted. The Vice-Chancellor believed it, and I see no reason for disturbing his conclusion. All the surrounding circum stances concur in favour of the case made by the Respondents; and I am of opinion that the decision of the Vice-Chancellor must be affirmed.

With regard to the question of the £110 which was due to the building society on the property, it is clear that if you once prove that a man has made an agreement to sell a house, it must be taken that he means to sell it free from incumbrances, without his saying so. So, if a man agrees to settle a house in consideration of marriage, he must be taken to mean free from incumbrances. And I can see no difference in this respect between a freehold and a leasehold house. I am, therefore, of opinion that the Respondents are entitled to have an assignment of this house free from incumbrance, and that the £110 must be paid out of the intestate's estate.

JAMES and BRAMWELL, L.JJ., concurred.

Solicitors: *Rooks & Co.; Henry Kelly.*

M. R.
1877
March 12.

HENDERSON *v.* MAXWELL. (2.)

[1875 H. 10a]

Copyright—Periodical—Infringement—Registration before Publication— 5 & 6 *Vict. c.* 45, *ss.* 13, 18.

10 Ch D 257

The proprietor of a book or periodical has no copyright therein under 5 & 6 Vict. c. 45, if it is not actually published at the date of its registration at *Stationers' Hall.*

Accordingly, where the proprietor of a periodical had registered its first number at *Stationers' Hall* before publication, although he had then entered on the register the date of its intended publication, which was the actual date:—

Held, that, having regard to sects. 13 and 18 of the Act, and to the form of requiring entry of proprietorship in the schedule to the Act, he was not entitled to copyright in the periodical, nor to an injunction to restrain its alleged infringement.

Statement.

THIS was the rehearing of an action which came on for hearing on the 9th of November, 1876, when judgment was given for the Plaintiff, the proprietor of a periodical, and an injunction was granted restraining the publication by the Defendant in a separate form of a serial written by the Defendant, and which had been published in successive numbers of the periodical, on the ground that it was an infringement of the Plaintiff's copyright.

The case is reported (1) on one point on which a question was raised on behalf of the Defendant, namely, whether the registration of the first number of the periodical was sufficient under sect. 18 of 5 & 6 Vict. c. 45, although neither the serial nor the first number containing it had been separately registered.

It appeared that the first number of the periodical was registered at *Stationers' Hall* before publication on the 25th of November, 1862, and that the date of publication entered on the register (which was the actual date of publication) was the 3rd of January, 1863, and the question now raised on the rehearing, which had been granted on the Defendant's application, was whether such antedated registration of publication was a sufficient compliance with the provisions of the Act.

(1) 4 Ch. D. 163.

The rehearing ended by leave taken plaintiff by consent
for him is now no question to be heard as to
Morgan C 12 C.L.D. 8 S. C.

Davey, Q.C., and *Romer*, for the Defendant:— Argument.

The copyright under the Act 5 & 6 Vict. c. 45, s. 2, is the exclusive liberty of "printing or otherwise multiplying copies of" any "book," including "volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan separately published." But at the time of making the entry at *Stationers' Hall* there was no book in existence, and consequently the entry was a nullity. That registration, in order to be effectual, must follow, not precede publication, is clear from sect. 13, which requires the date of publication to be part of the entry: *Maxwell* v. *Hogg* (1); *Correspondent Newspaper Company* v. *Saunders* (2).

Chitty, Q.C., and *Rigby*, for the Plaintiff:—

The Act is a remedial Act, and ought to be construed liberally. It has always been the practice of publishers to register before actual publication, and if the date of publication as entered at *Stationers' Hall* agrees, as in this instance, with the actual date, the Act is sufficiently complied with.

JESSEL, M.R.:— Judgment.

I must say that I allow this objection with some reluctance, when I consider that the person taking it is a publisher.

It is clear that the statute contemplates two things: first, that the person who makes the entry at *Stationers' Hall* shall be the proprietor of the copyright; and, secondly, that the book to which the entry relates shall be a published book. Consequently, no man who is not the proprietor of the copyright in a published book, including, by sect. 2, "any volume or part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan," can make an entry with respect to it that will be of any avail. Until the thing is published and given to the world it is not within the statute.

Then, what is the position of the proprietor of the copyright in a periodical? The copyright of the proprietor of a periodical in articles composed for publication in the periodical is given by sect. 18, and that section clearly refers to something already pub-

(1) Law Rep. 2 Ch. 307. (2) 13 W. R. 804; 11 Jur. (N.S.) 540.

M. R. 1877 HENDERSON v. MAXWELL. (2.) Judgment.

lished. How can a man be said, in the words of that section, to "project, conduct, carry on, and be the proprietor of" a periodical that is not yet in existence? As proprietor of the periodical, he is entitled to protection for articles appearing in it in the same manner, the section says, "as if he were the actual author;" and in order to be protected he must, by sect. 13, make entry of the title, the time of publication, and so on, in the register at *Stationers' Hall.* It is clear that "book" there must mean "book published," or how could the entry be made of the time of publication, or the name and place of abode of the publisher, that is, of the person who has published it? The form of requiring entry of proprietorship in the schedule to the statute makes the case, if possible, plainer. Among other particulars the proprietor is to certify the date of first publication. It would require the gift of prophecy to do that, if the book were not already published.

It is plain to my mind that this is a void entry, and all I can do is to dismiss this action. I should not give to the Defendant his costs if he were to ask for them.

Solicitors for Plaintiff: *Linklater, Hackwood, & Co.*
Solicitors for Defendant: *Crowdy & Son.*

M. R. 1877 *March* 28.

GRIFFITH *v.* PAGET.

[1877 G. 75.]

Company—Winding-up—Preferred Shareholders—Transfer to New Company—General Meeting—Distribution of Assets—Companies Act, 1862, *ss.* 133, 161.

6 Ch D. 571.

At a general meeting of a limited company, having its capital divided into preferred and deferred shares, resolutions were passed by the statutory majority for a voluntary liquidation and transfer of the business to a new company in consideration of shares in the new company being allotted to the two classes of shareholders in the old company so as to give to the preferred shareholders a different proportion of the capital of the new company from that which they were entitled to in the old company. In an action by a dissentient preferred shareholder on behalf of himself and the other preferred shareholders:—

Held, that sect. 161 of the *Companies Act,* 1862, only enables the general

SC at hearing 6 Ch D. 571.

meeting to decide on the nature of the consideration to be accepted, and not on the mode of its distribution.

Semble, the only proper mode in which such consideration could be divided among the members of a company would be, under sect. 133 of the Act, according to their rights and interests in the company.

Statement.

THE Plaintiff in this case, *Gideon de G. Griffith*, was the registered holder of thirty preference shares in the *Argentine Tramways Company, Limited*, and sued on behalf of himself and all other the preferred shareholders in the said company other than the persons named as Defendants.

The Defendants were the company and the chairman and directors.

The Defendant company was incorporated under the *Companies Acts*, 1862 and 1867, and was registered on the 26th of September, 1871. The memorandum of association provided that the capital should consist of £250,000, divided into 15,000 preferred shares of £10 each, and 10,000 deferred shares of £10 each. Each of the preferred shares was to be entitled in each year to preferential dividend at the rate of £12 per cent. per annum on the amount for the time being paid up on such shares, but was not to be entitled to participate further in the profits of the company.

The deferred shares were not to be entitled to participate in any year in the profits of the company until the preferential dividend should have been paid up on the preferred shares for the current year and all preceding years, but any deficiency in the preferential dividend in any year was not to be deemed to bear interest: subject, however, to the payment in manner aforesaid of the said preferential dividend, the net profits of the company were to belong to and be divided among the holders of the deferred shares in proportion to the number of such shares respectively held by them. There was no provision as to the distribution of the surplus assets in the event of the company being wound up.

The preferred and deferred shares were duly allotted; most of the deferred shares were held by the directors and their friends.

In February, 1876, the directors proposed that the deferred shares should be cancelled, and that in their place preferred shares should be allotted to the holders thereof; and at a general meeting of the company held on the 3rd of February, 1876, a

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resolution was declared to be passed approving of such proposal, which was confirmed at a subsequent meeting on the 24th of February, 1876. Thereupon *R. H. Harper*, a preference shareholder in the company and a dissentient to the said resolution, brought an action against the directors to restrain them from carrying the said proposal into effect, and on the 16th of March, 1876, an injunction was granted by the Master of the Rolls restraining them from so doing.

On the 8th of March, 1877, the directors issued a circular to the shareholders informing them of the course they proposed in consequence of the said injunction, which, so far as material, was as follows: "They" (the directors) "have had a new company registered, called the *Anglo-Argentine Tramways Company*, with a capital of £165,000, in 33,000 shares of £5 each, and they have caused to be prepared for the approval of this company an agreement with the new company for the transfer to such company of the whole of the assets of this company, retaining only sufficient cash to pay the dividend for the year ending the 31st December, 1876. In consideration of this transfer the said new company is to issue to this company as fully paid up the whole of its existing share capital except seven shares which have been taken by the subscribers to the memorandum of association, and is to undertake to discharge all the debts and liabilities of this company, including the payment of the dividends already declared but unpaid. The shares so to be issued to this company it is proposed should be divided as follows:—30,000 of such shares, representing the nominal amount of £150,000, will be allotted to the holders of the 15,000 preferred shares in this company in proportion to their holdings, and the residue of 2293 shares, representing the nominal value of £14,965, will be allotted to the holders of the 10,000 deferred shares in this company. As the shares in the new company will be issued as fully paid-up shares of £5 each, the holders of preferred shares in this company will be entitled to receive two shares in the new company for each £10 preferred share held by them in this company."

The Plaintiff, on receiving this circular, gave notice to the Defendant company and the directors that he dissented from the proposed arrangement.

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At a general meeting of the Defendant company, duly summoned, and held on the 16th of March, 1877, after the Plaintiff's notice had been received, it was resolved by the statutory majority of the members present that the company be wound up voluntarily; that liquidators be appointed; that they be authorized to carry into execution a provisional agreement made between the Defendant company and the *Anglo-Argentine Tramways Company*, whereby the assets of the Defendant company were agreed to be sold to the new company; also, "That the 32,993 shares of £5 each in the said last-mentioned company to be received by this company upon the said sale be allotted as follows:—First, as to 30,000 thereof to the holders of the 15,000 preferred shares in this company in proportion to the number of such preferred shares respectively held by them, being two of such shares of £5 each for each one of such preferred shares; secondly, as to 2993, being the residue thereof, to the holders of the 10,000 deferred shares in this company in proportion to the number of such deferred shares respectively held by them."

The directors then gave notice of an extraordinary general meeting for the 6th of April then next for the purpose of confirming these resolutions.

The Plaintiff then brought his action, and alleged by his statement of claim that the dividends were not nearly sufficient to pay 12 per cent. to the preferred shareholders, and that the resolutions proposed to be carried out were in fact in pursuance of a scheme of the directors to raise the value of the deferred shares at the expense of the preferred shareholders.

The Plaintiff claimed a declaration that the provisional agreement which had been come to between the two companies was fraudulent and void as not being authorized by the memorandum of association of the Defendant company; that such agreement was not binding on the Plaintiff and other the preferred shareholders of the Defendant company; and an injunction to restrain the Defendants from confirming, or taking any steps to confirm, the resolutions passed on the 16th of March, 1877.

A motion was now made on behalf of the Plaintiff for an injunction until the hearing of the action.

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Argument.

Chitty, Q.C., and *C. H. Turner*, in support of the motion.

Davey, Q.C., and *O. L. Clare*, for the Defendants, said that they were willing to give an undertaking not to act on the resolution, supposing it should be confirmed by the general meeting, until the trial or further order of the Court. The resolutions could be carried out in the form of giving a bonus to the preferred shareholders, to which all the deferred shareholders assented. They referred to *In re London India Rubber Company* (1).

Judgment.

JESSEL, M.R. :—

The question which is now raised, as far as I know for the first time, is this, whether in the case of a limited liability company, when there are two or more classes of shareholders having different rights *inter se*, and the powers conferred by the *Companies Act*, 1862, s. 161, are exercised, the company can do more than decide on the nature of the consideration to be accepted, or whether it can, at the same time, by the statutory majority, decide as to the mode of distribution of the consideration so accepted between the two classes of shareholders. In my opinion it cannot do the latter at all.

I think the meaning of the 161st section, stated broadly, was this, that instead of disposing of the assets of the company, wound up under a voluntary winding-up, for money, you may dispose of them for shares in any other company, or policies, or any like interest, or future profits or other benefit from the purchasing company, but that whatever the benefit was, in whatever shape it was taken, it was to be given, or paid, or handed over to the liquidators for the benefit of the contributories, if I may call them so, of the company wound up—of course subject to the payment of their debts; and that there was no authority conferred by the Act of Parliament on the general meeting, or rather the statutory majority, to direct a distribution as between those contributories otherwise than according to their rights *inter se*. I think that is tolerably plain from the nature of the case.

First, what is to become of the assets of the company when

(1) Law Rep. 5 Eq. 519.

wound up voluntarily in the ordinary way? In that case we find, by the 133rd section, the property, after being applied in satisfaction of the liabilities, is to "be distributed among the members according to their rights and interests in the company." Therefore, if the liquidator sells the assets for money, there is no power given to a general meeting to alter the rights of the contributories *inter se*. They are to share according to their rights and interests. Of course, if there is a difficulty in ascertaining the rights and interests, that difficulty would be solved by taking proceedings before a Court of Justice to ascertain such rights.

Now, the 161st section never could have been put in to allow a general meeting to distribute money and shares when they could not distribute money standing alone. It will be found the 161st section not only contemplates taking shares and policies, but receiving "shares, policies, or other like interests." Therefore, the result would be that I might come to the conclusion that, if a company sold its assets for £100,000, the £100,000 would be distributed among the partners according to the rule laid down in the 133rd section, whereas if it sold it for £100,000 *plus* one share of £20 in another company, three-fourths of the voting power—for that is what it is—could divide the property in any way they thought fit among the shareholders, that is, they might vote it to the three-fourths present at the meeting if so minded; if they had this absolute power, they might positively, by a vote at the meeting, vote it to themselves, and say, We will confiscate the property of the other shareholders who are only entitled to one-fourth of the voting power. Now, the other shareholders so excluded might be entitled to three-fourths of the property of the company, for in many companies preference shareholders, as they are called, have no voting power at all. In fact, I believe it is the case in many of the railway companies, and if that were so in the company wound up, the people who have little or no interest in the company might confiscate nearly the whole of the property of the company.

That is a startling conclusion to arrive at, and nothing but the absolute words in the Act of Parliament would enable a majority of the shareholders to vote away for their own benefit the property of the shareholders. It may be said they have their remedy,

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because anybody who objects to the resolution may, by giving a certain notice, in a certain time require his shares to be taken at a valuation. But the answer to that is simple. There must be contemplated a great number of shareholders who have not that power. They may be beyond the seas, or sick, or lunatic, and unable to take advantage of the section, and it would be a great injustice to allow a majority of the voting power to take away the bulk of the property belonging to other people.

I cannot conceive that such was the intention of the Legislature. I do not find any express words which will authorize me to impute so unjust an intention to the Legislature, and I am of opinion, therefore, that the meeting has no power whatever of deciding upon the distribution of the shares they are going to accept among their own members. That being so, I think that portion of the resolution is beyond the authority of the company; but, it being an interlocutory motion, and the directors being willing to give an undertaking not to act on it, if they choose to confirm it they may, so as to raise the question at the trial or before another tribunal; but if they are advised not to question my judgment, of course they can affirm the resolution *simpliciter*, leaving out the objectionable clause.

There is another alternative presented to me by the counsel of the Defendants. They say they are giving a bonus to the preference shareholders, and that every one of the deferred shareholders consents to that. There would then be no objection to their passing a resolution to that effect.

The Defendants undertaking not to distribute the shares to be received under the agreement, no order will be made on this motion except that the costs shall be costs in the action.

Solicitor for Plaintiff: *E. Beall.*
Solicitors for Defendants: *Cunliffe & Beaumont.*

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[1876 H. 367.]

Charitable Trusts Act, 1853 (16 & 17 *Vict. c.* 137), *s.* 17—"*Suit or other Proceeding*"—*Certificate of Charity Commissioners.*

The governors of an endowed school commenced an action against the master to restrain him from presenting himself at the school or continuing to occupy the schoolhouse, on the ground that he had never been properly appointed to the mastership, was unfit to fulfil its duties, and had been removed by a resolution of the governors. The master demurred, on the ground that it did not appear that the action had been sanctioned by the Charity Commissioners:—

Held (affirming the decision of the Master of the Rolls), that the sanction of the Charity Commissioners to a proceeding of this nature was not requisite.

Statement.

THE Plaintiffs were the governors of a charity school at *Asby*, in *Westmoreland*, and the Defendant was the schoolmaster. The statement of claim alleged that the Defendant had never been properly appointed to and was unfit to fulfil the duties of the office; that he had been formally removed by a resolution of the Plaintiffs; that they had given him notice of his removal, and called on him to give up possession, but that notwithstanding such notice he continued to present himself at the school and to teach, and to occupy the the schoolhouse and land belonging thereto.

The Plaintiffs claimed by this action, first, "An injunction to restrain the Defendant from presenting himself at the school or teaching therein, or attempting to do so, or otherwise intermeddling therewith;" secondly, "An injunction to restrain the Defendant from remaining in occupation of the schoolhouse or land belonging thereto;" and thirdly, further or other relief.

The Defendant demurred to the statement of claim on the ground that an order or certificate of the Charity Commissioners authorizing the action had not been obtained under sect. 17 of the *Charitable Trusts Act*, 1853 (1).

(1) The material parts of sect. 17 of the *Charitable Trusts Act*, 1853 (16 & 17 Vict. c. 137), are as follows:—

"Before any suit, petition, or other proceeding (not being an application in any suit or matter actually pending) for obtaining any relief, order, or direction concerning or relating to any cha-

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Argument.

The demurrer was argued before the Master of the Rolls on the 29th of January, 1877.

Shebbeare, for the demurrer, cited *Braund* v. *Earl of Devon* (1).

E. Cutler, for the Plaintiffs:—

First, the sanction of the Charity Commissioners under sect. 17 of the Act is only required to proceedings relating to the administration or application of the property of a charity: *In re Lister's Hospital* (2); *Braund* v. *Earl of Devon* (3); *Re Ford's Charity* (4); but not necessarily to every such proceeding, for charity funds may be paid into Court under the *Trustee Relief Act* and dealt with without such sanction: *Re St. Giles and St. George Bloomsbury Volunteer Corps* (5).

Secondly, the section was only intended to apply to Chancery or Equity proceedings, not to an action of this kind, which, under the old practice, would have been a common law action of ejectment.

Although under the new practice an action of this description may now be brought in the Chancery Division, yet the effect of

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rity, or the estate, funds, property, or income thereof, shall be commenced, presented, or taken by any person whomsoever, there shall be transmitted by such person to the said board" (of Charity Commissioners), "notice in writing of such proposed suit, petition, or proceeding, and such statement, information, and particulars as may be requisite or proper, or may be required from time to time, by the said board, for explaining the nature and objects thereof; and the said board, if upon consideration of the circumstances they so think fit, may, by an order or certificate signed by their secretary, authorize or direct any suit, petition, or other proceeding to be commenced, presented, or taken with respect to such charity, ... and every such order or certificate may be in such form and may contain such statements and particulars as such board shall think fit; and (save as herein otherwise provided) no suit, petition, or other proceeding for obtaining any such relief, order, or direction as last aforesaid, shall be entertained or proceeded with by the Court of Chancery, or by any Court or Judge, except upon and in conformity with an order or certificate of the said board: Provided always, that this enactment shall not extend to or affect any such petition or proceeding in which any person shall claim any property or seek any relief adversely to any charity."

(1) Law Rep. 3 Ch. 800.
(2) 6 D. M. & G. 184, 186.
(3) Law Rep. 3 Ch. 800, 805.
(4) 3 Drew. 324.
(5) 25 Beav. 313.

existing Acts of Parliament remains unaltered: *Judicature Act*, 1873, s. 76.

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Shebbeare, in reply:—

"Other proceeding" in sect. 17 must be taken to include an action at law, and "any Court or Judge" to mean "any Common Law Court or Judge."

JESSEL, M.R.:—

Judgment, M.R.

The point is not new to me, for I have had to consider it in Chambers more than once, and I must say I have a very clear opinion upon it.

The first question is, what is the purview of the Act? I cannot do better than quote what the full Court of Appeal said in *In re Lister's Hospital* (1). The Lord Chancellor (Lord *Cranworth*), in delivering the judgment of the Court, says: "The object of the Act was to stop the enormous abuses which had grown up in the administration of charities in reference to proceedings which used to be instituted to the good of no one."

Now I entirely concur, if I may say so with great respect, in the observations made by Lord *Hatherley*, then Lord Justice, in the case of *Braund* v. *Earl of Devon* (2), where he says: "The object, no doubt, of the provision in the statute was, as is stated in *In re Lister's Hospital*, to put an end to certain very scandalous proceedings"—these scandalous proceedings were Chancery proceedings"—"on the part of individuals who, ascertaining that there was a fund disposable for the purpose of charities which had been overlooked, and thinking that a considerable profit might be made in the way of costs, instituted proceedings which were not likely to produce good to any one. But the object with which that particular section was passed cannot, of course, confine its operation, except so far as the terms warrant it, to the particular cases which originated it. Of course it is impossible to distinguish in any Act of Parliament the motives of those who might afterwards be induced to institute suits respecting charities; and therefore the Legislature thought it right that, in the case of every suit with reference to the administration of charitable

(1) 6 D. M. & G. 184, 186. (2) Law Rep. 3 Ch. 800, 804.

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funds"—that is how Lord *Hatherley* puts it—"there should be a preliminary application to the Commissioners, a matter of no very great difficulty, not precluding any parties interested in charities from justice, but, on the contrary, very much facilitating and assisting them, and guiding them in the institution of their suits." Then he states the object of the suit.

Then Lord Justice *Selwyn* says (1): "The suit is in the very terms of the Act a suit for obtaining relief 'concerning or relating to any charity, or the estate, funds, property, or income thereof.'" And he goes on to say: "There is no condition precedent in this section, that those funds should have been ascertained, or should have been set apart, or any scheme directed for the administration of those funds. The words are general, and we are bound to follow them." There are no other authorities to which it is necessary for me to refer.

The next question is, what is this particular action? The action is this: The governors of the charity school have dismissed the schoolmaster, and he insists on retaining possession of the schoolhouse. I say nothing about the form of the claim not asking for delivery of possession, for it asks further relief. This is simply what would formerly have been termed an action of ejectment, and nothing else. It is substantially an action to turn the schoolmaster out of possession of the house to which he has no right whatever; it is a legal demand of possession and nothing else. It is properly nothing but an action for the recovery of land, and the form of relief asked, if I am not unduly criticising the claim, should have been the same, and have asked for such delivery.

That is what this action is. There is no doubt that such an action as this would have been demurrable for want of equity under the old system, had it not alleged a sufficient case of injury, or threatened injury, for an injunction, which I think this action does not. Therefore, if the *Judicature Act* had not been passed, this would have been a mere common law action of ejectment. But the passing of the *Judicature Act*, 1873—not forgetting the 76th section, which says that Acts of Parliament are to be read as applying to Judges of the High Court—does not affect the

(1) Law Rep. 3 Ch. 807, 808.

meaning of the particular Act of Parliament now in question as to the kind of suit intended to be thereby restrained. If, therefore, I should come to the conclusion that the Act was not intended to interfere with ordinary actions at law, it would not be more or less an interference because the action at law is now brought in the High Court of Justice, instead of being brought in the Queen's Bench, Common Pleas, or Exchequer, as formerly.

What are the words of the section, and how ought the Court to construe them? The Court is not to be oblivious—and I have cited from the authorities to which I have referred to shew that such is the case—of the history of law and legislation. Although the Court is not at liberty to construe an Act of Parliament by the motives which influenced the Legislature, yet when the history of law and legislation tells the Court, and prior judgments tell this present Court, what the object of the Legislature was, the Court is to see whether the terms of the section are such as fairly to carry out that object and no other, and to read the section with a view of finding out what it means, and not with a view to extending it to something that was not intended.

So reading this section, I have no hesitation in saying that, in my opinion, the fair construction is, that it was not intended to restrict or interfere with actions at law. Though it has been decided not to interfere with or restrict some other proceedings, there is no decision, as far as I am aware, as to an action at law.

The more you study the section the clearer, I think, my view of it becomes. It begins, "Before any suit, petition, or other proceeding (not being an application in any suit or matter actually pending) for obtaining any relief, order, or direction concerning or relating to any charity, or the estate, funds, property, or income thereof, shall be commenced."

Now, first of all, the words are, "suit, petition, or other proceeding." No doubt an action at law is a "proceeding," but is that the way the Legislature would describe an action at law? Then it says, "shall be commenced, presented, or taken." Everyone knows you "brought" an action, but the words here are, "suit, petition, or other proceeding shall be commenced, presented, or taken"—all words descriptive of the procedure of the Court of Chancery or of the Equity Courts. Is it conceivable

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that such a thing as a common law action would have been omitted, and that we should not have had the words "action brought," if it was intended to include an action at law?

But this is not all; for where it says "not being an application in any suit or matter actually pending," the word "action" is left out again. I think the words, when you come to look at them, shew pretty clearly what was meant.

But that is not all. "For obtaining"—what? "Any relief, order, or direction, concerning or relating to any charity." Are those words applicable to a common law action? "Relief, order, or direction," are words applicable to equity procedure only, namely, "relief" that is sought by a bill, "order, or direction," that is sought by a petition or other proceeding. There, again, we have words which do not point to an action at law. You did not get in an action at law "relief, order, or direction," but what you got was judgment, which is again a well-known term, although it is now applicable to all the actions in the High Court. But we have not got "judgment" in the section, but "relief, order, or direction."

Then the section goes on, "concerning or relating to any charity, or the estate, funds, property, or income thereof." What does that mean? Could we have an action at law "concerning or relating to any charity"? It might in a sense relate to "the estate, funds, property, or income" of a charity, because they might belong to a charity, but not to "the estate, funds property, or income" of a charity *quâ* charity. If you bring an action for trespass, for breaking into and entering the close of a charity, it is an action for trespass, though in a sense it relates to the property of the charity, but only in a sense. The action is for a disturbance of the possession. It would be speaking in a very wide sense to call that an action asking for relief relating to a charity and estate of a charity. It relates to the disturbance of the possession, and, therefore, to the property in a very remote sense indeed. That being so, I am satisfied upon these words, if there were nothing more, we should find that the section could not be applicable to an action at law.

Then come these words, "there shall be transmitted by such person"—that is, the person to complain—"notice in writing of"—

what?—"of such proposed suit, petition, or proceeding." Again the word "action" is left out, "and such statement, information, and particulars as may be requisite and proper, or may be required from time to time, by the said board, for explaining the nature and objects thereof; and the said board, if upon consideration of the circumstances they so think fit, may, by an order or certificate, signed by their secretary, authorize or direct"—what?—"any suit, petition, or other proceeding to be commenced, presented, or taken with respect to such charity." Now that is all they can authorize. The only proceedings which shall be taken are "with respect to such charity." That is quite intelligible if it were intended only to relate to Chancery or Equity proceedings with reference to the administration of charitable property, as Lord Justice *Wood* says. The certificate is only in relation to a charity.

Then the section says, "and every such order or certificate may be in such form and may contain such statements and particulars as such board shall think fit; and (save as herein otherwise provided) no suit, petition, or other proceeding for obtaining any such relief, order, or direction as last aforesaid, shall be entertained or proceeded with by the Court of Chancery, or by any Court or Judge, except upon and in conformity with an order or certificate of the said board."

Now, it is said that the words, "or by any Court or Judge," mean any Common Law Court or Judge. But is that the way they are described? Have the Legislature forgotten how to describe the Courts of Queen's Bench, Common Pleas, or Exchequer? Would it have said merely "the Court of Chancery, or any Court or Judge," if it had intended to include Common Law Courts and Judges? But there were other "Courts and Judges," both Equity Courts and Courts exercising an equitable jurisdiction. For instance, there were the Courts of *Lancaster* and *Durham*, which had equitable jurisdiction, and there was the County Court, which also had an equitable jurisdiction to a certain extent. There were plenty of Courts to explain those words without importing so violent a construction as that "any Court or Judge" shall mean the superior Courts of *Westminster*.

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Then the section concludes, "Provided always, that this enactment shall not extend to or affect any such petition or proceeding in which any person shall claim any property or seek any relief adversely to any charity."

It is plain to my mind that that means a person claiming adversely to any charity; that is, it must not be read as relating to the case of a mere Defendant, unless on a counter-claim, when he would be in the position of a Plaintiff.

But the next section throws more light upon it, if any light were wanted beyond what I have pointed out. The 18th section is this: "Provided always, that it shall be lawful for Her Majesty's Attorney-General acting *ex officio* to make such applications, and take and prosecute such proceedings with respect to any charity, in the Court of Chancery or otherwise as to him may seem fit, as if this Act had not been passed." The Attorney-General did not bring an action at law, but an information. No doubt he could have filed his information pretty well in any Court as a matter of privilege. "And that nothing in this Act contained shall be construed as dispensing with the fiat or allowance of Her Majesty's Attorney-General with respect to any proceeding not being an application under the jurisdiction created by this Act where such fiat or allowance was necessary before the passing of this Act." Of course that does not apply to the present case.

It appears to me, therefore, when you come to look at the Act, whether you look at it historically, as Lord *Cranworth* did in the first case I have referred to, or whether you look at it historically and judicially, as Lord Justice *Wood* did in the second case, it is plain that the fair meaning of the section is not that which has been suggested, namely, to interfere with an ordinary action at law, whether of trespass or ejectment.

I should be extending the operation of the statute—which was passed for a totally different purpose, namely, to stop those costly proceedings which submitted the property of charities to equity litigation—if I were to extend it to stop an ordinary action at law to recover possession of a schoolhouse.

Whether or not it is desirable that a check should be placed upon the proceedings of the governors of charities, even as to

such proceedings as these, it is for the Legislature and not for Courts of Justice to determine. C. A. 1877 HOLME v. GUY.

In my opinion, this is not an action to which the consent of the Charity Commissioners is required, and therefore I overrule the demurrer, with costs.

The Defendant appealed. The appeal was heard on the 24th of April. C. A.

Ince, Q.C., and *Shebbeare*, for the Appellant:— Argument.

We say that, on the fair construction of the Act 16 & 17 Vict. c. 137, no litigation as to the affairs of the charity can be commenced without the sanction of the Charity Commissioners: sects. 9, 12, 17, 18, 19.

[JAMES, L.J.:—Can it have been intended to make the consent of the Commissioners requisite before proceedings are taken to turn out a trespasser?]

Sect. 22 provides for the removal of a master.

[JAMES, L.J.:—That appears to apply only to cases where a master is appointed for life and takes a freehold interest.]

The *Charitable Trusts Act*, 1860, s. 13, provides a mode of removing a master, and shews the intention that it should not be done without the Commissioners. On the face of this statement of claim the Defendant has acted as master ever since 1860, and after such a tenure of office he cannot be removed on the ground that he was not originally well appointed: *Attorney-General* v. *Hartley* (1). The master, therefore, has, *primâ facie*, a good defence, and proceedings to remove him ought not to be taken without the consent of the Charity Commissioners. *Braund* v. *Earl of Devon* (2) is analogous.

[JAMES, L.J.:—That was a case to which the Act clearly would apply.]

There is no sufficient reason for confining the enactment to proceedings in equity. "Suit" includes "action," for "brings his suit" has long been a known expression at common law.

(1) 2 Jac. & W. 353, 375. (2) Law Rep. 3 Ch. 800.

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Fischer, Q.C., and *E. Cutler, contrà*, were not called upon.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I agree with the Master of the Rolls that this is not a case requiring the certificate of the Commissioners. It is, in my judgment, clear that the 17th section of the *Charitable Trusts Act*, 1853, was never intended to interfere with the rights or powers of the trustees of a charity in their character of owners of property, or to interfere with their rights in the character of masters who are employing servants. Its object was to prevent strangers from coming in as relators in suits in Chancery, or as Petitioners under *Sir Samuel Romilly's Act*, to complain of the management of a charity, unless the Charity Commissioners are first satisfied that such proceedings ought to be taken. It was not intended to prevent the trustees of a charity from bringing an action of ejectment against a tenant holding over, or an action of covenant against a tenant who would not pay his rent, or to prevent their taking proceedings by way of distress against a defaulting tenant, or to prevent their taking proceedings against a man who, as according to the statements in the claim is the case here, never was properly appointed to an office, but will persist in retaining it, and in thrusting himself on the property of the charity as a trespasser. Such cases, under the old practice, were to be tried in an action of law, to which the Act of Parliament does not apply. It may be said that the allegations in the statement of claim are not well founded, and that the master may claim a right to the office on the ground that he was not properly removed. That defence cannot be taken by demurrer, but must be tried on evidence at the hearing. The order of the Master of the Rolls must be affirmed.

MELLISH and BAGGALLAY, L.JJ., concurred.

Solicitors: *Kynaston & Gasquet; Johnston & Harrison.*

Ex parte LANCASTER. *In re* LANCASTER.

C. A.
1877
C. J. B.
Jan. 29.
C. A.
May 3.

Composition—Registration of Resolutions—Proxy signed in Blank—Objection to Proof—Notice to objecting Creditor of Application to register—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 16 (*sub-ss.* 6, 8), 71, 80 (*sub-s.* 8)—*Bankruptcy Rules*, 1870, *rr.* 85, 271, 275, 295.

Held, by the Court of Appeal (reversing a decision of *Bacon*, C.J.), that a proxy paper signed by a creditor, leaving the name of proxy in blank, may be filled up by the person to whom the creditor has intrusted it, with a verbal authority to use it, and that when so filled up it will be valid.

Held, by the Court of Appeal (*Baggallay*, L.J., dissenting), affirming the decision of *Bacon*, C.J., that a creditor who has objected to a proof tendered at a meeting under a liquidation petition, and has had his objection marked upon the proof, ought to have notice given to him, either by the Registrar or by the person whose duty it is to register the resolutions passed at the meeting, of the time when and the place where the application for the registration of the resolutions is to be heard.

A creditor, who had objected to a proof of debt, had no notice given to him of the application to register the resolutions carried by means of that proof, and they were registered in his absence. He afterwards applied to the County Court Judge to vacate the registration, and upon the hearing of this application he insisted upon some technical objections, but did not ask to have the creditor, whose proof he had objected to, cross-examined, or adduce any evidence to shew the invalidity of the debt:—

Held, by the Court of Appeal, that the irregularity had been cured, and that the registration ought not to be vacated.

Statement.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

W. M. Lancaster filed a liquidation petition in the *Barnstaple* County Court on the 4th of August, 1876. The first meeting of the creditors was held in *London* on the 31st of August, and was adjourned to the 21st of September. At the adjourned meeting on the 21st of September, Mr. *Ffinch*, the debtor's solicitor, proposed resolutions in favour of a composition. The resolutions were put to the meeting by the chairman; the names of the creditors who were present in person or by proxy were called over, and the way in which they voted was ascertained, and it was stated that the composition resolutions were not carried. Mr. *Ffinch* then said that he had some proofs, which he did not wish to put in if he could help doing so, but he must now put them in; and

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he handed to the chairman a proof of his own firm for £123 in respect of costs, and a proof of Mr. *Lancaster Lucas*, the debtor's father, for £633. Mr. *Lumley*, the solicitor of Messrs. *John Baily & Son*, who had proved a debt of £188, objected to the admission of the father's proof, on the ground that the form of proxy at the foot of the affidavit, though signed by *Lucas*, was not filled up with the name of any person as proxy. He also objected that no debt was due to the father. Mr. *Lumley* indorsed on the affidavit the following memorandum: "Objected to by Mr. *Lumley* for Messrs. *Baily & Son*, on the ground that the creditor cannot vote as no person's name is filled in in the proxy, and the proof is objected to on the ground that there is no debt owing by the debtor to the creditor." This indorsement was signed by the chairman. Mr. *Ffinch* then informed the meeting that he should fill in his own name as proxy, and he accordingly did so, and the proof and proxy were received by the chairman, and, the vote being given in favour of the composition resolutions, they were carried by the statutory majority. The resolutions provided that a composition of 10s. in the pound should be accepted, which was to be payable on the 30th of October, and was, to the extent of £2000, to be secured by a deed of appointment by the debtor and his father of certain settled estates to a trustee for the creditors.

The above statement of what took place at the meeting was contained in an affidavit filed on behalf of *Baily & Son*, who voted against the resolutions. A somewhat different account was given in an affidavit made by Mr. *Ffinch*. He stated that no counting of the votes of the creditors upon the composition resolutions took place until after the proofs of his firm and *Lucas* had been handed to the chairman. Mr. *Ffinch* also stated that *Lucas*, after he had signed and sworn his affidavit of proof with the proxy attached, handed it to him, and instructed him to attend the meeting on his behalf, and, if necessary, to vote in favour of the composition resolutions. The second meeting of the creditors was held on the 29th of September at *Barnstaple*, when the resolutions were confirmed, and they were registered on the 3rd of October. No notice was given to *Baily & Son* of the hearing of the application for registration, and they gave no notice either to

the debtor or to the Registrar of their desire to be heard by the Registrar in opposition to the registration. No one was present on their behalf to oppose the registration. On the 19th of October the debtor and his father executed a deed of appointment charging the settled estates with £2000 for the benefit of the creditors. On the 31st of October *Baily & Son* gave notice of motion before the Judge of the County Court to vacate the registration of the resolutions. This motion was refused with costs. At the hearing of it *Baily & Son* insisted only on their technical objections, and did not adduce any evidence to contradict *Lucas's* proof, or ask that he might be cross-examined. *Baily & Son* appealed to the Chief Judge.

Statement.

The appeal was heard on the 29th of January, 1877.

Pollard, for the Appellants:—

Argument.

The proxy was invalid; it did not comply with rule 85 of the Bankruptcy Rules, 1870 (1). The vote ought, therefore, to have been rejected. Again, the votes of the creditors having been counted, and it having been ascertained that there was not a sufficient majority to carry the composition, the functions of the meeting were at end. The resolution could not be put again, and the subsequent voting was *ultrà vires*: *Ex parte Till* (2). Such an objection can be raised after registration: *Bankruptcy Act*, 1869, s. 71; *Ex parte Browning* (3). Thirdly, the objection to the vote having been indorsed on the proof, the Registrar ought to have dealt with it upon the application to register: Rule 271 (4); and

(1) Rule 85 provides that "The instrument appointing a proxy shall be in writing under the hand of the creditor . . . and such instrument shall be according to the form in the schedule." Form No. 32 in the schedule (for appointment of proxy when added to proof) is as follows: "I appoint *C. D.*, of &c., my proxy in the above matter."

(2) Law Rep. 10 Ch. 631.

(3) Ibid. 9 Ch. 583.

(4) Rule 271: "All proofs and proxies intended to be used at any general meeting, and not previously filed, shall be handed in to the chairman of the meeting. Any objection thereto shall be marked thereon by the chairman, and shall be dealt with by the Registrar on the resolution being presented to him for registration."

Rule 295 provides that, "Upon presentation of a special or extraordinary resolution for registration, the Registrar shall examine the same, and may hear any creditor who shall have given him notice of his desire to be heard thereon."

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he ought to have taken the indorsement as a notice, under rule 295, of the objecting creditors' desire to be heard upon the registration, and ought to have given them notice of the hearing of the application to register. As it is, they have had no opportunity of being heard. The registration ought to be vacated.

Argument.

Finlay Knight, for the debtor:—

Whether notice of the application to register should have been given to the Appellants is immaterial, for in any event there would, no doubt, have been an appeal from the Registrar to the Judge. But the Judge's decision was right. The proxy was signed by the creditor and he handed it to his solicitor, giving him authority to use it. It was enough that the name of the proxy was filled in before it was actually used: *Bankruptcy Act*, 1869, s. 16, sub-ss. 6, 8; s. 80, sub-s. 8; Bankruptcy Rules, 1870, r. 85. In *In re Tahiti Cotton Company* (1) it was held that where the articles of association of a company permitted a transfer of shares to be made by an instrument in writing, and an owner of shares borrowed money and deposited the certificates of his shares with the lender, and also blank transfers signed by him, the lender had power to fill up the blanks with the name of a transferee, and that the legal interest in the shares then passed to the transferee. As to the other objection, the answer to it is that there had been no final determination upon the composition, the creditors not having signed any resolution. Till that had been done, it was open to any creditor to prove his debt and vote: Bankruptcy Rules, 1870, r. 275 (2); *Ex parte Pooley* (3).

Judgment, C. J. B.

BACON, C.J.:—

I think that the registration procured by such means and in such a manner as this ought not to stand. I will consider first this proxy, as it is called. The words of the statute are perfectly clear.

(1) Law Rep. 17 Eq. 273.

(2) Rule 275 provides that "Only such resolutions as are reduced into writing, and are signed by or on behalf of the statutory majority of the creditors assembled at a meeting, shall be taken cognizance of by the Court, but the signatures of such creditors may be subscribed subsequently to the meeting, but prior to the filing or registration of the resolution."

(3) Law Rep. 5 Ch. 722.

It is in the power of any creditor to appoint any one he thinks fit as his proxy, but if he does appoint him he must do so by an instrument in writing. There is not the slightest resemblance in the present case to *In re Tahiti Cotton Company* (1). When a depositor of shares for money transfers them in blank, he does so because it is part of his contract that he shall give authority to the person to whom he hands the transfer to insert the name of any other person as transferee. It is intended that the depositee shall have the right to sell the shares, and, that contract having been entered into, the time when the depositee is to transfer them, and when the name of the transferee is to be put in, is when the money is paid by the purchaser; and it is a natural incident that the person who is to sell the shares should have a right to nominate the person to whom they are to be transferred. But is there, either in fact or in principle, any similarity between that case and the case of a proxy appointed to do certain things for another in a bankruptcy or composition? The Act of Parliament says, in the plainest terms possible, that votes may be given by proxy, and rule 85 expressly provides that the instrument appointing the proxy shall be in writing under the hand of the creditor, and shall be an authority to the appointee of the creditor to vote for him. Here, then, was a piece of paper signed in blank, and if it was in the power of Mr. *Ffinch*, in pursuance of any verbal understanding between him and the creditor, to fill in his own name, he might have filled in any other person's name; and how can it be assumed that when a man takes a proxy from *A. B.*, *A. B.* would allow him to fill in the name of *C. D.*? The giving of a proxy is an exercise of confidence on the part of him who gives it, and if he omits to put in the name of the person he authorizes to act as proxy, in my opinion the instrument is imperfect, and, till by the hand of the maker some name is inserted in the proxy, it is of no value, no utility, no force whatever. That was Mr. *Ffinch's* position when he was at the meeting. At that meeting a resolution for a composition was put and lost, and there was an end of it. The votes of the creditors and the amount of their debts were calculated, and they were written down, and it was ascertained by the votes there and then that there was not a sufficient majority to carry the

(1) Law Rep. 17 Eq. 273.

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resolution. Then, the thing so standing, Mr. *Ffinch*, in the discharge, I dare say, of what he thought was his duty to his client, said, "Very well, I will throw in something which will turn the scale. I have a proxy which will enable me to turn the scale." Then an objection is taken to the proxy, and a memorandum in writing is drawn up of that objection, and also of an objection as to the debt itself. These objections are recorded on the back of the proof, and so they go to the Registrar, whose duty it is to see that all the requirements of the Act are complied with. I do not say that it was the duty of the Registrar to give notice to the creditors who had taken the objection, but I say, without the slightest hesitation, that it was the duty of Mr. *Ffinch* to give notice to them when he was about to ask that the resolutions should be registered. Knowing that there were these objections, I say that it was not a proper mode of conducting business not to give that notice to them, and that ground alone would be a sufficient reason for saying that these resolutions cannot have a binding effect upon the dissentient creditors. But there is this other ground, namely, that, there having been a plain resolution put before the meeting and lost, it was not competent then to attempt to re-open the question, even if any one had desired to do so. Instead of doing that, the difficulty is supposed to be overcome by producing a blank proxy, and so turning the scale in number and value. In my opinion, that was altogether wrong, and these resolutions ought not to have been registered, and the registration must now be set aside.

The appeal will be allowed with costs.

C. A.

From this decision the debtor appealed. The appeal was heard on the 3rd of May, 1877.

Argument.

Winslow, Q.C., and *Finlay Knight*, for the Appellant:—

The solicitor had authority to fill up the proxy in his own name, and he did so before he used the proxy. That is sufficient: *Bankruptcy Act*, 1869, s. 80, sub-s. 8; Bankruptcy Rules, 1870, rr. 85, 300; *Hibblewhite* v. *M'Morine* (1). At any rate, *Lucas* never

(1) 6 M. & W. 200.

objected to the use of the proxy, and he has ratified what was done by executing the deed of appointment. As to the question of notice, the practice in the *London* Bankruptcy Court is to give notice of the application for registration to those creditors whose objections have been marked upon any of the proofs (1). On the other hand, the practice in the *Barnstaple* Court is for the objecting creditors to give notice to the Registrar if they desire to be heard upon the application for registration. The latter practice appears to be in accordance with rule 295. As to the other point, the meeting had not come to any final determination before *Lucas's* proof was tendered. The only way in which the voting can take place is by the signing of the resolution: Bankruptcy Rules, 1870, r. 275; *Ex parte Pooley* (2).

[They were stopped by the Court.]

Pollard, for *Baily & Son* :—

The proxy was not intrusted to Mr. *Ffinch* unconditionally, but only that he might use it in the contingency of its being necessary to do so; that could not constitute a valid proxy. It could not be made valid by the subsequent act of Mr. *Ffinch*. When he filled up the blank the proxy had already been handed to the chairman and made use of. Moreover, when this was done the creditors had come to a decision, and the meeting was at an end. It was then too late to tender the vote: *Ex parte Till* (3). Again, *Baily & Son* had no opportunity of being heard before the Registrar on their objection to Mr. *Lucas's* debt. The memorandum on the proof was sufficient notice of their desire to be heard, and notice of the hearing of the application to register ought to have been given to them: Bankruptcy Rules, 1870, rr. 271, 295. That is the practice in the *London* Court. The practice in the *Barnstaple* Court is an exceptional one.

(1) The reporter is informed by Mr. Registrar *Keene* that the practice of the *London* Bankruptcy Court is this: The person who applies for the registration of the resolutions is required to give notice of the time appointed by the Registrar for the hearing of the application to the persons who have objected to any of the proofs, and also to the persons whose proofs have been objected to, and, if necessary, it is required that the service of the notice shall be verified by affidavit.

(2) Law Rep. 5 Ch. 722.

(3) Ibid. 10 Ch. 631.

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Winslow, in reply, upon the last point only:—

Every objection was before the County Court Judge on the hearing of the application to vacate the registration. The Respondents did not then ask to have Mr. *Lucas* cross-examined, but they allowed his affidavit of proof to remain uncontradicted. They cannot now impeach the validity of his debt.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

I am of opinion that the order of the Chief Judge cannot be sustained. With regard to the objection which was principally relied upon in the first instance, the objection to the proxy, I think that the proxy must be held to have been sufficient. The creditor made a proper affidavit of proof of his debt, and signed a proper form of proxy, leaving, however, the name of the person who was to use it in blank. He left the affidavit and the proxy with Mr. *Ffinch,* his solicitor, in order that they might be used by him at the meeting if and when it should be necessary. I think that this conferred ample authority upon Mr. *Ffinch* to fill up the blank with his own name as the proxy. He had as full authority to write in his own name as if he had called his client's attention to the omission at the time when he signed the proxy, and the client had then directed him to put in his own name. When the name was written in, the proxy became a valid proxy, complying with all the requirements of the Act and the Rules, and it was in the proper form before it was used at the meeting. The objection to it was taken when it was handed in to the chairman for the purpose of being used. Mr. *Ffinch* admitted the validity of the objection, and cured the defect immediately, while the proxy was being used, by writing in his own name. I think that he was in time to remove the blot. The second objection to the registration was this, that the meeting had come to a final determination upon the resolutions before the proxy was filled up and used. Upon the evidence, I am of opinion that that was not so. There had been only a talk about how the majority would be. It appeared by counting the votes, and somebody so stated, that the majority would be against the composition, and thereupon, before the result of the votes had been announced by the chairman, and

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while the matter was still in progress, this proof and proxy were tendered, and produced the requisite statutory majority in favour of the composition. Just as when a division is about to take place in the House of Commons, the lobbies are instantly searched, and the members who happen to be there are brought into the House in time to vote, so here, what was done was done while the thing was still *in fieri*. The third point was this: The objection to the proxy was marked upon the proof in due form, and it extended not only to the proxy, but also to the validity of the creditor's debt, and it is said that the objection ought to have been dealt with by the Registrar in some way or other, and that the objecting creditors ought to have had an opportunity of being heard before the Registrar upon their objection. If it were necessary to decide this question, I should be of opinion that the course taken by the Registrar was not altogether right. When an objection has been marked upon a proof, I think that some notice ought to be given to the objecting party of the time when the Registrar intends to deal with the objection. If, in order to ascertain whether there is the proper statutory majority in favour of the resolution, it becomes necessary to determine whether the proof which has been objected to is valid or not, I think that the Registrar ought to give both parties an opportunity of being heard before him upon the objection. There is no definite provision in the Rules about this, and it appears that a practice prevails in the *London* Bankruptcy Court and in the *Liverpool* County Court, and some other Courts, different from that which has been adopted in the *Barnstaple* Court. But, though there is no rule on the subject, I think that some reasonable notice ought to be given of the time when the application for registration of the resolutions is to be heard, so that when a proof has been objected to, both parties may have an opportunity of being heard upon the objection. In the present case, however, the objecting creditors had full opportunity before the County Court Judge, on the hearing of their application to vacate the registration, of insisting on their objections, and of contesting the validity of Mr. *Lucas's* debt, and thus of doing all which they could have done before the Registrar. It was quite open to them on that occasion to say, "We desire to cross-examine Mr. *Lucas* and to adduce evidence ourselves in

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opposition to his alleged debt," and they might have asked for an adjournment for this purpose. They did not choose to do this, but preferred to rely entirely on their technical objections, and abandoned their right to dispute the debt. That being so, I think it is too late now, after so many things have been done under the resolutions, to set aside the registration. I am satisfied that no substantial injustice has been done, and I think that the registration ought not to have been disturbed. The order of the Chief Judge must therefore be discharged.

Baggallay, L.J. BAGGALLAY, L.J.:—

I am of the same opinion. I do not desire to add anything as to the first and second objections. With regard to the third, I am disposed, after some hesitation, to think that, upon the true construction of the Act and the Rules, there was no irregularity in the registration of the resolutions. At the same time, if I had thought that the objecting creditors had been prevented by a mistake or misapprehension from being heard upon their objection to the debt, I should have been very anxious to find some mode of allowing them an opportunity of being heard now. And I think it is very desirable that some practice should be established which will enable an objecting creditor to know when he should come forward and support his objection. But here the objecting creditors had full opportunity of doing this when they were before the County Court Judge, and they chose rather to rely upon their technical objections than upon evidence to shew the invalidity of Mr. *Lucas's* debt, to which they had objected. There is no suggestion that they expressed any wish to cross-examine Mr. *Lucas*, or to adduce any evidence of their own to contradict him. I think, therefore, that there is no ground for disturbing the registration.

Bramwell, L.J. BRAMWELL, L.J.:—

On the first and second points I agree entirely with Lord Justice *James*. As to the third, I agree with him that the proceedings before the Registrar were not quite regular; indeed I doubt whether they were not irregular. Rule 295 says that when the resolution is presented to the Registrar for registration

he is to examine it, and he "may hear any creditor who shall have given him notice of his desire to be heard thereon."

It appears to me that it follows from that, by a necessary implication, that the creditor is to have an opportunity of giving notice to the Registrar of his desire to be heard against the registration, and this implies that he ought to have notice of the time and place of the hearing of the application. To say that a man has a right to be heard, and to say that he is not to have notice of the time when the matter is coming on for hearing is practically to take away his right to be heard. In the present case, the time which elapsed before the registration seems to me to have been insufficient. I think that somehow or other there must be some such duty of giving notice as appears to have been assumed by the practice adopted in the *London* Court. I do not say whether the duty is imposed on the Registrar or on the person who propounds the resolution to him for registration; but it appears to me that it follows by necessary implication from the Rules that some such duty is imposed upon some one. However, in the present case I think the irregularity has been cured. Possibly *Baily & Son* might have adopted this course: They might have gone to the County Court Judge and have said to him, Your Registrar has not done his duty in this matter, and we ask you to direct him to do it, by hearing our objection to the debt. That would have been one possible mode of procedure. Another mode would have been to appeal from the Registrar to the County Court Judge, and to ask him to do that which the Registrar ought to have done. This was the mode of proceeding actually adopted by *Baily & Son*, and their case was gone into before the Judge, all their objections were taken, and the Judge overruled them all, including the objection that no debt was due to Mr. *Lucas*. There are no materials before us upon which we can impeach the decision of the Judge on this point. It is true that Mr. *Lucas* was not cross-examined, but this was *Baily & Son's* own fault. They chose to run the risk of not having *Lucas* brought there and cross-examined. In effect they have had every benefit which they would have had if they had received timely notice of the application to register the resolutions, and had attended upon the hearing. I think, therefore, that they are not entitled now to insist upon any objection which

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arises by reason of the irregularity which took place before the Registrar.

BRETT, L.J.:—

On the first point, I am of opinion that the proxy was made perfect in amply sufficient time. On the second, I am of opinion that the creditors had come to no final resolution before Mr. *Lucas's* proxy was handed in and used for the purpose of voting. With regard to the third point, I at first doubted whether the Rules require any notice to be given to an objecting creditor. But, after full consideration, I have come to the conclusion that it follows from the Rules by necessary implication that some notice is to be given, so that the objecting creditors may have an opportunity of being heard before the Registrar comes to any decision under either rule 271 or rule 295. Under rule 271 the Registrar is, on the resolution being presented to him for registration, to deal with the objections which have been marked upon the proofs, that is, to deal with them judicially. And under rule 295 I think that a creditor who has not made any objection at the meeting may give notice to the Registrar of his desire to raise an objection upon the hearing of the application for registration. In either case the Registrar is to act judicially, and it would be contrary to natural justice that a judicial decision should be given without either hearing both the parties or affording them an opportunity of being heard. If that be so, it follows by necessary implication that notice of the time and place of the hearing should be given to the parties, which is in substance the same thing as if the Rules had expressly said so. And as the Rules contain no specific provision about it, the notice must be a reasonable notice, and the practice of the *London* Court appears to me to have established a very good way of giving the notice, that is, that the person whose duty it is to register the resolution should give the notice to the objecting creditor and to the creditor whose proof is objected to. I think, therefore, that there was an irregularity in the registration in the present case. But after the registration had been made Messrs. *Baily & Son* applied to the County Court Judge to set it aside, and they then had an opportunity of shewing that Mr. *Lucas* had no valid debt. They might have given notice to

him to attend and be cross-examined as to his debt, or they might have adduced evidence to contradict him. They did not take either of those courses; they called no witnesses and asked for no adjournment. They allowed his proof to be put before the Judge uncontradicted, and upon that evidence he decided that the debt was valid, and I think that his decision is binding. Notwithstanding the irregularity which occurred before the Registrar, no injustice has been done to the objecting creditors. The appeal must therefore be allowed.

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Solicitors for Debtor: *Clarke, Woodcock, & Ryland,* agents for *Chanter, Finch, & Chanter, Barnstaple.*

Solicitors for Respondents: *Lumley & Lumley.*

ASHWORTH *v.* OUTRAM.

[1876 A. 35.]

C. A. 1877 V.-C. M. *March* 13. C. A. *May* 16, 17.

Married Woman—Separate Estate—Business carried on before Marriage—Earnings during Coverture—Married Women's Property Act, 1870 (33 & 34 *Vict. c.* 93).

A woman in 1855 entered the service of a man as housekeeper in a house which was in his occupation but was not his ordinary place of residence. He shortly afterwards engaged to marry her. In 1861 she commenced the business of preserving fruit, which was begun upon a small scale, but gradually became a large wholesale business. It was carried on by her in her own name; she kept a separate banking account; and he admitted that it was her own business, and was managed solely by her, though he sometimes assisted. In 1874 he married her. After the marriage the business was carried on by her as before, in her maiden name; her husband resided in the house where it was carried on, but it did not appear that he took any further part in it than he had done before the marriage. He shortly afterwards died intestate:—

Held (affirming the decision of *Malins,* V.C.), that the stock-in-trade and capital of the business belonged to the widow, and were not part of the husband's estate.

ADJOURNED SUMMONS.

Statement.

This was a suit for the administration of the estate of *Thomas Outram,* who died intestate on the 19th of August, 1874, and the question raised by the summons was whether the capital and stock-

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in-trade of a fruit-preserving business carried on by his wife formed part of his estate.

Thomas Outram was, in 1855, interested in a cloth business at *Halifax*, and resided principally with other members of the family at a house called *Ellistons* adjoining the manufactory and forming part of the family property, his mother being treated and considered as the occupier. He also carried on the business of a farmer and a chemical manufacturer at a place called *Bradley*, at a short distance from *Halifax*, where there was a house of which he was the occupier, and which he used for the purposes of these businesses, but did not sleep there, it being only a few hundred yards from his mother's house.

In the above year, 1855, the Defendant, *Sarah Outram*, then *Sarah Fairbank*, spinster, went to live at *Bradley* to act as his housekeeper and look after the domestic part of his farming business. He shortly afterwards engaged to marry her. She continued to reside there in this capacity till the marriage, which did not take place till 1874.

In the year 1861 *Sarah Fairbank*, with the knowledge and consent of *Thomas Outram*, commenced carrying on, in the house at *Bradley*, the business of fruit-preserving. The business began on a small scale, but gradually increased in importance, and before long became a profitable wholesale business. *Thomas Outram's* credit appeared to have been used in the first instance in establishing the business, but the widow deposed positively that when she commenced it she had £300 arising from legacies left to her and from her savings, and she denied its having been established with his money. He took a great interest in it, and frequently sent his labourers to help when extra help was wanted; but the business was carried on in her name, and it appeared to have been under her sole management, though goods ordered for it were frequently ordered by and consigned to *Thomas Outram*, but so far as appeared they were so ordered at her request. In 1865 she opened a separate banking account in her own name at the bank where *Thomas Outram* kept his account. No settlement of accounts appeared ever to have taken place between her and *Thomas Outram*, but it appeared from the banking account that the sums he paid for goods consigned to him for the purposes of the busi-

ness were, to a great extent, if not wholly, repaid by cheques drawn on her account.

On the 6th of April, 1874, on which day the marriage between the intestate and Mrs. *Outram* took place, the balance standing to her credit was £1534, while his account was overdrawn by about £2000. She had also a large stock of preserves on the premises at *Bradley*. *Thomas Outram*, on the marriage, took up his residence with her there.

There was no settlement, or written agreement for a settlement, on the marriage of Mr. and Mrs. *Outram*, and no distinct verbal agreement for a settlement, but there was evidence that both before and subsequently to the marriage *Thomas Outram* had repeatedly spoken of and treated the preserving business as hers, and as being a matter with which he himself had no concern.

On the 23rd of May, 1874, not long after the marriage, complaints being made by the bank manager of *Thomas Outram's* account being overdrawn, as mentioned above, Mrs. *Outram* went to the bank and drew a cheque for £1500, which she signed with her own name and that of her husband, upon the moneys standing to her account, and paid it in to his account for the purpose of reducing the balance. She deposed to the fact that her husband, when informed of it, expressed dissatisfaction at her having done so. At the time when she made this transfer the manager of the bank told her that, being a married woman, she could not keep a separate account, and that only one account must be kept for both, namely, that of the husband. From that time she transacted all her banking business through her husband's account, drawing cheques upon it which she signed in his name. The trifling balance which remained to her credit after drawing the cheque for £1500 was left standing in her maiden name.

She continued to carry on the preserving business, and, as it appeared, in precisely the same way as before, retaining her maiden name on the pots of preserves which were sent out. Her husband, it appeared, gave assistance as he had done before, but did not interfere with the management, and when people called on matters relating to the business, he referred to her, and, if she was out, told them that they must see her. She paid the wages, ordered and paid for fruit and sugar, and made all the sales.

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On the 19th of August, 1874, *Thomas Outram* died intestate. Mrs. *Outram* claimed to retain the business as her own, and refused to take out letters of administration to her husband. One of his sisters took out representation to him, and brought this action for the administration of his estate. A receiver was appointed, and the present application was for an order directing Mrs. *Outram* to hand over to the receiver the books relating to the preserving business.

The question to be now argued was, whether, assuming the business to belong to Mrs. *Outram* at the date of the marriage, it had become part of the estate of her husband. The case came on for hearing on the 13th of March, 1877.

Argument.

Glasse, Q.C., *Milward*, Q.C., and *Nalder*, for the Plaintiff:—

Assuming for the purpose of the present argument that at the date of the marriage the business belonged exclusively to the wife, the effect of the marriage was to vest it entirely in the husband, though no doubt, if with her husband's permission she carried it on after the marriage in her own name, any profits she might make in the interval between the marriage and *Thomas Outram's* death might belong to her as falling within the provisions of sect. 1 of the *Married Women's Property Act*, 1870. But there is nothing in the terms of the Act, or in any decision founded upon it, to extend its operation to the case of earnings made by a married woman before her marriage, and consequently such earnings remain subject to the common law, and therefore the property of the husband.

The title of the *Married Women's Property Act* sufficiently indicates that it was only intended to affect earnings made and property acquired after the date of the marriage. And it is also clear from the words that it was only intended as a provision for married women living apart from their husbands, or at most to preserve to them the fruits of their labour and skill acquired at some place where the husband either did not reside or did not carry on business.

J. Pearson, Q.C., *Higgins*, Q.C., and *Freeling*, for Mrs. *Outram*:—

The book debts and other effects of this business are in the

nature of *choses in action* requiring to be reduced into possession in order to give the husband a right to them. So that, apart from the *Married Women's Property Act*, 1870, the business, if belonging to the wife at the time of the marriage, must have remained her property unless some act of the husband can be shewn amounting to a reduction into possession. And if there was no reduction into possession during the marriage, the business survived to her.

After the marriage there is no question that the husband did not in any way interfere in the business, but left it to be conducted by Mrs. *Outram*, and the evidence is that he continued, as before the marriage, to say, whenever applied to, that the business was hers. The case, therefore, is brought distinctly within the *Married Women's Property Act*, 1870.

The construction of the Act contended for by the Plaintiffs cannot be supported. It is clear that it was intended to protect all the earnings of a married woman derived from a business which she, and not the husband, carried on. It would be straining the language to make it apply only to the case of a husband and wife living apart, or to a business not carried on at the place of business or residence of the husband. The Act also clearly applies to the case of a business commenced before the marriage, and carried on afterwards with the consent of the husband. And it would be an absurd construction to make it apply only to the mere earnings, and not to the business and property by which they were produced. Sect. 1 must be taken in conjunction with sect. 12, and if the earnings alone became the property of the wife, the result would be that the property which produced the earnings would belong to the husband, while at the same time he would not be liable for a single debt of the business; and although this 12th section has been to some extent modified by the *Married Women's Property Act* (1870) *Amendment Act*, 1874, such a construction as that contended for cannot be presumed to have been intended.

The cases on the *Married Women's Property Act* only touch the present question indirectly. *Howard* v. *Bank of England* (1) only went to the point of whether the *Bank of England* could be re-

(1) Law Rep. 19 Eq. 295.

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quired to take notice of a trust, and *Summers* v. *City Bank* (1) only related to the right of a married woman to maintain an action in her own name against a banker. There is also a case of *Green* v. *Carlile*, which came before Vice-Chancellor *Hall* on the 19th of February last, which shews that where there is separate estate such as a sum of money belonging to the wife, the mere fact of the husband obtaining possession, or having the money transferred into his name, will do no more than make him a trustee for the wife. But it has been held that the right of action conferred by this Act does not extend to making a married woman a bankrupt, at all events where there is no separate estate: *Ex parte Holland* (2). Then, again, the husband expressing himself dissatisfied with the transfer from the wife's account to his is strong evidence that he intended her to carry on the business on her own account. According to the decisions this business would be considered as something designated by the husband for the separate use of his wife after the marriage, as it had been conducted by her previously, and as such it belongs to her now: *Slanning* v. *Style* (3). Independently of the Act, the Court will assume an agreement to make this separate estate. But the effect of the Act, taking the 1st and 12th sections together, is to make property or business out of which earnings are made part of the separate estate of the wife, together with the earnings themselves. If she is to have the earnings she ought also to have the means of making them available.

Glasse, in reply.

Judgment, V.-C. M.

MALINS, V.C., after considering and commenting on the facts of the case, and concluding that at the date of the marriage the business belonged exclusively to Mrs. *Outram*, continued :—

I have to consider what was the effect of the marriage. It has been urged by Mr. *Glasse* and Mr. *Milward*, and I entirely assent to the proposition, that by the law of *England* it is a plain rule that whatever personal property a wife has when she marries, whether in possession, reversion, or remainder, vests in the husband, as to

(1) Law Rep. 9 C. P. 580. (2) Law Rep. 9 Ch. 307.
(3) 3 P. Wms. 334.

that which is in possession absolutely; and as to that which is in reversion or remainder, liable to this risk only, that if it is not reduced into possession during the coverture it survives to the wife. If, therefore, a debt is owing to a woman when she marries, it vests in the husband to this extent, that he can sue the debtor and give a valid discharge for the debt; but his right is qualified in this way, that if he does not reduce it into possession it goes to the wife if she survives him.

Under this rule, therefore, this business, which belonged to the lady at the time of the marriage on the 6th of April, 1874, vested entirely in the husband. He would therefore be entitled to all the stock-in-trade which is in possession, to the business itself, and to all that might be owing in respect of it. He would be entitled to every farthing of debts owing to the business, subject to this only, that if the debts were not recovered during the coverture they would survive to her.

That, I believe, is an accurate statement of the law as between husband and wife. In the absence of anything on the part of the husband amounting to acquiescence, I take it to be clear that when the marriage took place *Thomas Outram* was entitled to say, "I will not have you carry on this business any more. I am entitled to everything, and will have the business sold and receive the money." He was entitled to take this course immediately after the marriage, and he might have received all the trade debts.

Now *Thomas Outram* did not die insolvent. There is no claim by creditors, and the next of kin can only take that which he could himself have claimed. If, therefore, instead of exercising his rights and insisting on breaking up the business and selling the stock-in-trade and getting in the debts, he acquiesced in his wife continuing the business, I have then to consider what is the effect of that acquiescence. And that he did acquiesce is beyond all dispute. She was engaged in it at the time of the marriage, and the period between the marriage and his death comprised part of the fruit season during which the operations of the business had to be carried on. And though, under an erroneous impression of law, her banking account was transferred into his name, all the payments and drawings in respect of the business were made by Mrs. *Outram*, who signed the cheques in her husband's name. There-

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fore, that *Thomas Outram* did not avail himself of the right he had to break up the business, sell the stock-in-trade, and call in the debts, can admit of no doubt whatever. He acquiesced in her carrying on the business, and the question is, what is the effect of that acquiescence.

Now Mr. *Pearson* and Mr. *Higgins* said correctly, I think, that it is not necessary for this purpose to have recourse to and rely exclusively upon the *Married Women's Property Act*, 1870. It is said, as I think quite correctly, that the rules of this Court are quite sufficient to enable me to arrive at a conclusion on the subject independently of that Act, though it may be, and I think is, very material. But independently of the Act, I take it to be pretty clear that *Slanning* v. *Style* (1) bears very strongly in principle upon this case. Mr. *Glasse* said, as he was quite justified in doing by the observations of Sir *Thomas Plumer* in *Walter* v. *Hodge* (2), that *Slanning* v. *Style* related to pin money. But that it was not a case of pin money appears clearly from the simple facts as stated by the reporter (3). "Another thing insisted upon on behalf of the Defendant, the widow, was that the testator allowed his first wife to dispose and make profit of all such butter, eggs, poultry, pigs, fruit, and other trivial matters arising from the said farm (over and besides what was used in the family) for her own separate use, calling it her pin money; and upon the death of the first wife, and until the testator married the Defendant *Style*, the testator's sister, the Defendant *Pelling*, kept his house and had the same allowance, which was also continued to the Defendant, the widow, after her marriage, by way of pin money, and it was proved in the cause that her husband, whenever any person came to buy any fowls, pigs, &c., would say he had nothing to do with those things, which were his wife's." Now that is exactly like the present case, for when anybody came to buy preserves *Thomas Outram* said, "All that is *Sarah's;* go to her. I have nothing to do with it."

In that case also the report goes on, "and that he also confessed that having been making a purchase of about £1000 value, and wanting some money, had been obliged to borrow £100 of his wife to make up the purchase-money; therefore now the widow

(1) 3 P. Wms. 334. (2) 2 Sw. 92.
(3) 3 P. Wms. 337.

claimed to be paid this £100. To which it was answered that there was no deed touching this agreement, nor any writing whatsoever." The argument is then stated, and the report continues (1): "But the Lord Chancellor decreed that the widow, the Defendant, was well entitled to come in for this £100 as a creditor before the Master; observing that the Courts of Equity have taken notice of and have allowed *feme coverts* to have separate interests by their husband's agreement, and this £100 being the wife's savings, and here being evidence that the husband agreed thereto, it seemed but a reasonable encouragement to the wife's frugality, and such agreement would be of little avail, were it to determine by the husband's death that it was the strongest proof of the husband's consent that the wife should have a separate property in the money arising by these savings, in that he had applied to her and prevailed with her to lend him this sum; in which case he did not lay claim to it as his own, but submitted to borrow it as her money. Wherefore, and especially as here was no creditor of the husband to contend with, it was ordered that the wife should be allowed to come in for this £100 as a creditor before the Master, and the Court cited the case of *Calmady* v. *Calmady*, where there was the like agreement made betwixt the husband and wife, and that upon every renewal of a lease by the husband two guineas should be paid by the tenant to the wife, and this was allowed to be her separate money."

Now, therefore, it is perfectly clear that if the husband agrees that his wife shall carry on a trade or business on her separate account after her marriage as she carried it on before, whether it be a trivial matter like that of selling eggs, poultry, pigs, and so forth, or whether it be the greatest trade in the kingdom, that amounts between him and her, and all persons claiming through him as volunteers, to an agreement that she should have the business for her separate use. An agreement may be either express or implied. If it had been proved that *Thomas Outram* had expressly said before the marriage that she should have the preserving business for her own use after the marriage as she had before, he would then have created for her a benefit. It is not proved that he said anything of the kind. I have no reason to suppose

(1) 3 P. Wm. 338.

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that he did, but I say that every act he did amounts to his saying so again and again every day of his life. He permitted her to carry on the business in her own maiden name, the day after the marriage, and every day up to the day of his death, precisely as she carried it on before the marriage, without any interference on his part either with the debts, the creditors, or the management, or anything whatever connected with it, and therefore my view is that there is acquiescence on the part of the husband that the wife after the marriage should carry on the business for her own exclusive benefit, as she had done before. Therefore, having most distinctly arrived at the conclusion that the woman was entitled to the business for her own benefit, I come with equal satisfaction to the conclusion that the husband intended she should have it for her own exclusive benefit after the marriage, as she had it before.

Independently of the *Married Women's Property Act*, I have the doctrines which have been appealed to again and again, and are laid down with perfect accuracy in *Roper* on Husband and Wife (1). It is laid down in these terms: "Independently of the acquirement by the wife of separate property by the means before mentioned, she may do so by carrying on trade on her own separate account, apart from and without the interference of her husband. Her character as a *feme sole* trader under the custom of *London* has been before discussed. Her ability to carry on such business on her own individual account, now to be considered, does not arise from any particular custom, but in consequence of the express agreement between her and her husband before marriage, or from his subsequent permission." Therefore Mr. *Roper* puts it as not being necessary to have it by agreement, but by subsequent permission. He continues: "When the agreement is made previously to the marriage, since the consideration is valuable, the transaction will not only be obligatory upon the husband, but also binding upon his creditors. When the agreement originates during the marriage, it will be void against his creditors, but good against himself."

Then he illustrates this proposition by a variety of instances, and further on (2) he says:—

"With respect to provisions made previously to marriage, for

(1) Jacob's Ed. vol. ii. p. 165. (2) Page 171.

enabling the wife to carry on trade for her separate use, and the property is actually vested in trustees, the same rules prevail in equity as at law in regard to the husband, his creditors, and her title to the stock in business and profits to her sole use, and which have been before mentioned. So also in settlements after marriage, when the property is transferred to trustees for the purpose before stated, the same rules prevail in both jurisdictions, and the like distinctions taken between those settlements that are founded upon a valuable consideration, and those that are merely voluntary, which have been before considered. But the difficulty originating in legal forms (when no trustees are appointed for the wife) which fetter the proceedings of Courts of Law, does not occur in equity; since, as has been shewn, a Court of Equity will make the husband a trustee for her separate use. If, therefore, the husband merely agree, in articles before the marriage, that his wife shall carry on business on her own sole account; or without any such agreement, if he permit her to do so afterwards, all that she earns in the trade will in equity be her separate property, and be applicable and disposable by her as such, subject to the demands affecting it."

Therefore the rule is, that if a husband permits a wife after marriage to carry on a business for her own separate use and benefit, that becomes her separate property, which as between him and her—not between his creditors, but between him and her—is binding, and makes the property her own separate estate. Independently, therefore, of the *Married Women's Property Act*, 1870, it appears to me that there would have been enough in this case to shew the acquiescence of the husband in allowing her to carry on the business after the marriage for her own benefit, as she had done before, and make this separate property.

Now this, I think, is confirmed by the *Married Women's Property Act*, 1870. What was the object of the Act? It was found that there was a great number of cases of familiar occurrence where a woman is carrying on a trade. A familiar instance is that of a dressmaker or a milliner, or where she is carrying on an artistic occupation, such as a singer, or an actress, or a sculptor, or any of those things in which women may be skilled and may earn great sums of money. It was thought a very hard thing that whatever a married woman earned by a business of this kind

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should immediately become, according to the settled principle of common law, the absolute property of the husband, and although in terms I am bound to say it seems that this Act is addressed to the gains of married women, and not to the case of a woman who carries on a business at the time of her marriage, it provides as follows:—[His Lordship read the 1st section of the Act, and continued:—] This lady did carry on a business and made profits in the occupation or trade in which she was engaged. He agreed that she should do so. Then, what does that give her? Does it give her merely the profits of the trade without the means of making those profits? because if the husband is to deprive her of all the stock-in-trade and all the capital, and she has not a farthing wherewith to buy sugar or fruit and what she wants, she cannot make the money. Take the very common case of a milliner. A man marries a milliner or a dressmaker in a large way of business. She is in possession of a very large stock of silks, satins, ribbons, laces, and all those things used in her trade. The husband acquiesces in her continuing to carry on that business. Is he to have all this stock-in-trade and she to have the profits? Or, if he has acquiesced in her carrying on the trade, does it not shew that she is to have the means of carrying on the trade —without which she cannot carry it on? Suppose a man marries a *prima donna*, under this Act all her earnings are her separate property. Do the jewellery, dresses, and various things necessary for the occupation belong to the husband? If they do, then, however much she may desire to sing, and however much the public may desire her to sing, if the husband chooses he may have every jewel and dress sold. The Act must have a rational interpretation. Therefore, when it says she is to have the fruits of her occupation or trade, or the result of her artistic skill, it seems to me that if she has the consent of her husband that she shall do these things, she must also have the means of doing so. If, therefore, he consents to her continuing to act as a painter, she must have her easel and canvas and various things she uses. If she be a sculptor, she must have her marbles and chisels and those things. If she be an actress or singer, she must have the dresses and jewels and those things, without which she cannot appear in public; and if she be, as in the present case, a preserve-maker, my opinion is

that she must have the pots and pans and stock of sugar and of fruit, and all the appliances which shall enable her to make money by that occupation. Consenting that she shall do the thing, means that she shall have the means whereby it is to be done; and to hold that all the stock-in-trade, and every debt owing to her, and everything she has in the world, except the skill, is to belong to the husband, and that she shall have the skill and power of carrying it on without any means of doing it, would, in my opinion, be an utter absurdity and a narrow construction of the Act of Parliament. Therefore my construction is, that when a man consents to his wife carrying on the particular occupation, and thereby gaining money, that is a consent to her having those things whereby those moneys are made. In this case, without the stock-in-trade, without the debts owing to her, and a little capital, she could not have carried on that occupation. I am of opinion he consented to that, and consenting to that means that he consented to her having the business and everything belonging to the business. That is the conclusion, therefore, on the Act of Parliament to which I arrive.

C. A.

The Plaintiff appealed from this decision. The appeal was heard on the 16th and 17th of May.

Argument.

Glasse, Q.C., and *Nalder*, for the Appellant:—

We claim the stock-in-trade and capital as part of *Outram's* estate. We admit that the business belonged to the woman before her marriage, but we say that on the marriage it passed to her husband. The only real question is whether he made a gift of it to his wife. There is no evidence of this; and clear evidence is necessary to rebut the husband's right: *Mews* v. *Mews* (1), *Grant* v. *Grant* (2); *Walter* v. *Hodge* (3); *McLean* v. *Longlands* (4). During her husband's life Mrs. *Outram* always used the pronoun "we" in the business letters, and never professed to carry on the business separately from her husband. The *Married Women's Property Act* protects the earnings during coverture, but nothing else.

(1) 15 Beav. 529.
(2) 34 Beav. 623.
(3) 2 Sw. 92.
(4) 5 Ves. 71.

11 Jan 85. 787.

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J. Pearson, Q.C., and *Freeling*, for the Respondent, the widow:—

The result of the evidence is, that after the marriage Mrs. *Outram*, with her husband's consent, carried on the business on her separate account. All the money by which it was carried on was hers, and also the pots and implements. The account at the bankers' stood in his name, because the bank would not allow her to have an account in her own name; but she drew all the cheques, signing her husband's name. That being so, the 1st section of the *Married Women's Property Act*, 1870 (33 & 34 Vict. c. 93), preserves to her all the capital, stock, and implements which she had when she married, as well as what she acquired in the business during her coverture.

[COLERIDGE, C.J, referred to sect. 11, and to *Summers* v. *City Bank* (1).]

If the Act protects the earnings, it must also protect the capital and stock which produce them. *MacNeillie* v. *Acton* (2) shews that power to carry on a trade includes a right to use the capital employed in it.

[They were here stopped by the Court.]

Glasse, in reply:—

We say there is no sufficient proof that this business was carried on after the marriage as a separate business. *Mews* v. *Mews* (3) and *Walter* v. *Hodge* (4) shew that a clear irrevocable gift by the husband must be proved. The Act was only to protect earnings acquired during the marriage. Suppose a man married a female sculptor, to whom would a bust which was unfinished at the time of the marriage belong?

[JAMES, L.J.:—If he allowed her to continue the business and finish the bust, it would be hers.]

Suppose it was finished at the time of the marriage.

[JAMES, L.J.:—The husband could claim it, but if instead of doing so he allowed her to continue the business of making and selling busts on her own account, it would be hers.]

(1) Law Rep. 9 C. P. 580.
(2) 4 D. M. & G. 744. 17 Jan 1641
(3) 15 Beav. 529.
(4) 2 Sw. 92.

On the marriage the husband could stop the business at once, the stock-in-trade being his, and the words "wages and earnings" cannot include stock-in-trade. It was not the scope of the Act to protect property which might have been protected by a settlement.

LORD COLERIDGE, C.J.:—

Judgment, C. A. Lord Coleridge, C.J.

In this case I am of opinion that the order of the Vice-Chancellor deciding "that the preserving business as such existed on the day of the marriage of the Defendant, *Sarah Outram*, and all accumulations since that time belong to such Defendant in her own right," was perfectly correct and must be affirmed. It is admitted that this business had been carried on by the present widow as her own for many years before the marriage. It must be taken to have been found as a fact by the Vice-Chancellor—and upon the evidence which has been adduced before us I see no reason to doubt the correctness of his conclusion—that after the marriage the husband permitted her to conduct the business separately from himself, and as her own trade or business. According to the evidence he scarcely interfered at all with the business, not more than we should naturally expect a person to do who lived in the same house and was the husband of the person who was carrying it on. He does not seem to have interfered at all in what may be called the conduct of the business; it had theretofore been carried on in the maiden name of the married woman, it continued to be so carried on, it is admitted that the maiden name of the married woman before her marriage represented the real person who was carrying on the business, and the retention of the maiden name after the marriage is strong evidence to shew that, although the legal name of the trader was altered, the trade was carried on by the same person, in the same manner, and with the same interest as before. I understand also that although invoices and bills were made out afterwards, at any rate by one of the brothers (his is the only account that has been brought before us), in the name of the husband and the wife, yet all the orders were given, as they had been before given, by the wife, and that the wife was the person to whom goods came, and who, when they had come, disposed of them in the course of business.

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The only evidence which has been brought before us to conflict with this in any manner is the evidence of two workmen whose affidavits have been read, and who deposed to the fact that in the year 1874, when the preserving season came on, they, while employed in the service of Mr. *Outram*, were taken off from their employment on the farm and employed for a time in the preserving business. They had been in Mr. *Outram's* service for some years, and the same thing had taken place during the preserving season in former years. Their being thus taken to assist in the preserving business seems to me in no manner to conflict with the evidence I have mentioned. What are the circumstances? Here is a man considerably older than the woman he marries, to whom he had been engaged for a good many years, and to whom he, no doubt, was much attached. What could be more natural than that from time to time he should allow her the service, when she wanted it, of men in his employ? I gather, moreover, from the affidavits, that before the marriage he himself paid them, whereas in the year 1874, although they may have been men in his employ, and although his consent may have been necessary for the employment of their services, it appears from their evidence that Mrs. *Outram* was the person who actually paid them. Therefore, as far as I can see, there is really no evidence in the case worth mentioning to conflict with the broad and plain result to be derived from the fact that the business went on after the marriage exactly as it had gone on before, was continued in the same manner and in the same name, and that the purchases and sales were made and conducted by the same person who before made and conducted them.

These being the facts, it must be taken, in my judgment, that the business was carried on, as the Vice-Chancellor has found it, for the benefit of the married woman separately from her husband, with his knowledge and consent.

Now, what is the consequence of that in point of law? It appears to me that it is twofold. First of all, according to well-known principles familiar not only to this Court but to Courts with which I am more conversant, the husband can by declaration, or by acts which are equivalent to a declaration, quite apart from the provisions of the *Married Women's Property Act*, constitute himself a trustee for his wife, and if he does so the Court will protect the property of which he has so made himself trustee, and

the earnings and the gains of the wife out of that property. That being the existing state of the law, the *Married Women's Property Act*, 1870, was passed enacting (sect. 1) "that the wages and earnings of any married woman, acquired or gained by her after the passing of this Act in any employment, occupation, or trade in which she is engaged, or which she carries on separately from her husband" (I leave out the intermediate part, which does not apply here), "shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married." That is an enactment passed with the knowledge and in view of the then existing state of the law as administered by Courts of Equity. Now what was that enactment intended to protect? It clearly means to protect the wages and earnings gained or acquired by a woman while married in any employment or trade carried on separately from her husband. I say while married, because I agree with Mr. *Glasse* that the Act was intended to protect the property of a person who is at the time married, and is not to be held in any way to alter the general rule of English law as to the relations of husbands and wives and the property of husbands and wives as affected by the marriage contract. Now, as I have said already, it seems to me the Vice-Chancellor was justified in finding as a fact that this person was engaged in an "employment, occupation, or trade" after the marriage separately from her husband, and the wages and earnings acquired in such employment, occupation, or trade, are admitted to be protected. But how far does this carry us? It seems to me that it must carry the protection, I will not say beyond the wages and earnings, but it must carry the protection of the wages and earnings to those things which are necessary to make the wages and earnings which are to be protected. Therefore, the effect of the Act, if fairly construed, is to protect the trade or business of the married woman which she carries on separately from her husband, for without the protection of the trade itself it is manifest that the protection of the wages and earnings in the trade is impossible. How can a person carry on an occupation or employment without materials? Can wages be made in any employment without what we may call tools? How could earnings acquired by the exercise of artistic skill be pro-

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tected without protecting the pens and paper, the canvas and brushes, or the other necessary implements which a person has to use in order to obtain the literary, artistic, or scientific result? It is plain that to give, I do not say a liberal or loose, but a rational construction to the Act, the protection afforded by it must be extended so far.

Then what is meant by a business, or a trade, or an occupation? I find it exceedingly well described, in language much better than I could use, in the case of *MacNeillie* v. *Acton* (1), to which Mr. *Pearson* has referred us this morning, the minutes in which I presume were drawn up by Sir *George Turner* himself. In that case the testator had directed that his trade should be carried on, and the question was what property was authorized to be employed for the purpose of carrying on that trade. I find in the minutes of the decree (1) a declaration that, according to the true construction of the will of the testator, "the testator's executors were not authorized or empowered to continue the trade or business in his will mentioned otherwise than with or by means of the property, capital, stock, and effects which were embarked and employed therein at the time of the death of the said testator," clearly implying, and, in fact, declaring, that to the extent of property, capital, stock, and effects which were embarked and employed in the business at the time of the death of the testator, the executors were permitted and justified in so using them. Then I may take it that, if the wages and earnings of a married woman are to be protected in an employment, the property, capital, stock, and effects embarked and employed in it at the time of the marriage, if they are allowed to be continued in the employment, and wages and earnings are allowed to be made therefrom, are protected by this section as necessary for the making such wages and earnings.

Therefore, without in the least degree infringing the old law, simply applying the *Married Women's Property Act* to the well-recognised principles of the law, I come to the conclusion that the stock-in-trade, which was the means of carrying on this business, and without which the business must have come to an end and there could be no wages and earnings, is protected in this case.

(1) 4 D. M. & G. 744, 755. 17 Jur. 1041, 1043.

The Vice-Chancellor, therefore, was perfectly right in his decree, and his judgment must be affirmed.

I would only say, as allusion has been made to other cases decided on the *Married Women's Property Act*, that although the Courts have declined to extend the *Married Women's Property Act* beyond its legitimate scope, and have held, in terms, that it did not affect the general rights of the husband, yet, as I conceive, they have held that whatever is fairly necessary to effectuate the protection which is the object of the Act must be held to be given by the words of the Act itself.

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JAMES, L.J.:—

James, L.J.

I am also of opinion that the declaration of the Vice-Chancellor in this case is right, and ought to be affirmed.

In former years, and down to times within my recollection, Judges of what used to be the Common Law Courts of this realm delighted in applying, rigidly and strictly, a series of rules and maxims which their predecessors had delighted themselves in devising, although they did not always commend themselves to the apprehension of the million. Amongst those maxims was one by which a married woman was held incapable of taking a gift, either from her husband or from a stranger—holding that in the one case it remained and in the other became the husband's property. But the Court of Chancery (a very great Court in its day, although it has now ceased to exist) invented that blessed word and thing, "the separate use of a married woman," and as that Court never allowed itself to be impeded or obstructed by mere technicalities, it provided that whenever it was necessary, and so far as it was necessary to give effect to that separate use of a married woman, the husband should be made a trustee of whatever property came to him in his marital right which ought to be so held. The legal right was not interfered with, but the husband was made a trustee for his wife. There are several cases of that kind in the books.

Now in this case, if the married woman (whether with the business that she had before the marriage or a business which she had established after the marriage with the consent of her husband is immaterial) was allowed by the husband to carry on that business for her own benefit, separately from and independently of him,

C. A. 1877 ASHWORTH v. OUTRAM.

which the Act of Parliament allows to be done, making the carrying on separately and distinctly a separate use for her, then the trade itself becomes her separate property, and everything that is incident to and connected with the trade becomes, in my opinion, part of that separate trade, and the husband is, if and so far as is necessary, a trustee of everything which was devoted to that trade of which he had allowed the wife to be the separate owner.

Judgment, C. A. James, L.J.

I am of opinion, therefore, for the reasons given by the Vice-Chancellor and also by my Lord, that the judgment of the Vice-Chancellor ought to be affirmed.

Baggallay, L.J.

BAGGALLAY, L.J.:—

If there had been no recognised principle of equity that a husband can constitute himself a trustee for his wife, and if the case had to depend upon the application of the provisions of the *Married Women's Property Act* to the general principle that a wife's property vests in her husband on the occasion of her marriage, I should have felt some doubt in holding that the case of the Respondent could be supported under any of the clauses of the *Married Women's Property Act*, or under any combination of those clauses. But such a principle does exist, and the simple question in all these cases is whether the evidence is sufficient to shew that the husband has so constituted himself a trustee. I am of opinion that in applying that principle to any case that comes under the consideration of the Court now, regard must be had to the evident object and intention of the *Married Women's Property Act*, 1870.

Now a husband may constitute himself a trustee by writing; he may do so by words which are clear and distinct, but he can also do so by acts. And having regard to the evidence in this case to which our attention has been called, I am satisfied that the husband had in this case constituted himself, even on the general recognised principle of equity, trustee for his wife of the property which has been declared by the decree of the Vice-Chancellor to belong to her.

Solicitors: *Layton & Jaques; Sewell & Edwards.*

ASHWORTH *v.* OUTRAM. (No. 2.)

C. A.
1877
May 17.

[1876 A. 35.]

Motion to commit—Appeal—Discretion of Judge.

The Plaintiffs moved to commit the Defendant for contempt in having sold certain property of the intestate in the cause in disobedience to an order that she should deliver up to the receiver all property of the intestate in her hands, but the notice did not ask for restitution of the property. The Vice-Chancellor refused to commit, and made the costs of the application costs in the action:—

Held, that an appeal would not lie from this order.

Statement.

ON the 17th of March, 1876, an order was made in this action appointing *J. Dearnley* receiver of the outstanding personal estate of *Thomas Outram*, deceased, and ordering the Defendant, *Sarah Outram*, to deliver up to the receiver all securities in her hands for such outstanding personal estate, together with all books and papers relating thereto.

On the 15th of February, 1877, the Plaintiffs moved that Mrs. *Outram* might be committed for having disobeyed this order in not handing over to the receiver the whole of the personal estate of *T. Outram*, and for having sold and disposed of parts of his personal estate and not accounted for the same, and that she might be ordered to pay the costs of the application.

Vice-Chancellor *Malins* refused the application, and ordered that the costs should be costs in the action. The Plaintiffs appealed.

Glasse, Q.C., *Milward*, Q.C., and *Nalder*, for the Appellants.

Pearson, Q.C., and *Freeling*, for the Defendant, were not called upon.

Judgment, Baggallay, L.J.

BAGGALLAY, L.J.:—

If you ask us to make an order for committal, you are appealing on a matter within the discretion of the Vice-Chancellor. If you ask us to make the Defendant pay the costs, you are appealing

C. A. 1877 ASHWORTH v. OUTRAM. (No. 2.) Judgment, James, L.J.

only for costs. Your notice of motion does not ask for restoration of the property.

JAMES, L.J. :—

The Vice-Chancellor did not think fit to make an order to commit, thinking that it was not necessary to commit for contempt in order to ensure future obedience, and did not consider the case one for costs. Both points are matters of discretion, and you cannot appeal from such an order. In *Witt* v. *Corcoran* (1) the Defendant had been ordered to pay costs, and so had a right to have it decided whether he had been guilty of contempt or not.

LORD COLERIDGE, C.J., concurred.

Solicitors: *Layton & Jaques; Sewell & Edwards.*

C. A. 1877 V.-C. B. *May* 3. C. A. *May* 30.

LORD COWLEY *v.* BYAS.

[1877 C. 196.]

Burial Acts—18 & 19 *Vict. c.* 128, *s.* 9—*Burial within* 100 *yards of a Dwelling-house—Injunction*—"*Threaten and intend.*"

The Defendant, in 1865, obtained leave from the Home Secretary to convert a piece of land containing twenty acres into a cemetery. He could not succeed in doing so, and the land remained unaltered. In 1876 an attempt was made to get up a company for the purpose, but the attempt failed. In the following year the Plaintiff, who was owner of a dwelling-house within 100 yards of the nearest part of the land, wrote to the Defendant to the effect that unless the Defendant would give an undertaking not to use any part of the land for a cemetery, he should take legal proceedings. The Defendant replied to the effect that he had no present intention of converting the land into a cemetery; that he would not give any undertaking not to do so if he found it desirable; but that if he should hereafter wish to use the property in that way, he would give the Plaintiff two months' notice of his intention to do so; and he stated that he should not bury within 100 yards of the Plaintiff's house without consent. The Plaintiff thereupon commenced an action, and *Bacon*, V.C., granted an interlocutory injunction restraining

(1) 2 Ch. D. 69.

the Defendant from using, "for burial or for a cemetery," the ground in question, "or any part thereof":—

Held, on appeal, that the injunction must be dissolved, for that there was no such threat or intention to use any part of the ground for a cemetery as to warrant the interference of the Court by injunction, supposing such use to be unlawful:

Held, further, that an injunction in the above form could not, in any case, have been supported, for that, under 18 & 19 Vict. c. 128, s. 9, a cemetery may come within 100 yards of a house, the only thing prohibited being actual burial within that limit.

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LORD COWLEY v. BYAS.

Statement.

THIS was an action seeking an injunction to restrain the Defendant "from using for burial or for a cemetery" certain land belonging to the Defendant known as *Leyton Park* and containing about twenty acres.

The land in question was within two miles from the boundary of the Metropolis, and in May, 1865, the Defendant, having conceived the idea of forming a cemetery upon it, applied to the Home Secretary for leave to do so. In August, 1865, leave was granted on condition that the regulations for new burial-grounds were observed therein, and that a belt of plantation surrounding it of not less than five yards wide should be preserved and maintained. Nothing, however, was done towards making the cemetery. In 1876, an attempt was made to get up a company for forming one, and in October of that year a memorial was presented to the Secretary of State by some of the neighbouring proprietors asking for a withdrawal of the permission given in 1865, and the site was examined by a Government inspector.

Lord *Cowley* was, under the will of the late Lord *Mornington*, equitable tenant for life of some property adjoining *Leyton Park* upon which was a dwelling-house, situate within 100 yards of the boundary between the properties. After the inspector had examined the site in 1876, Lord *Cowley* wrote to the Home Secretary asking whether the license of 1865 would be withdrawn. The Home Secretary replied on the 19th of March, 1877, that he was advised that he had no power to withdraw an approval once given, and referred Lord *Cowley* to the 18 & 19 Vict. c. 128, s. 9, as enabling an owner of a house within 100 yards from a site to prevent such site being used as a burial-ground.

On the 23rd of March, Lord *Cowley's* solicitors wrote to the

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Statement.

Defendant, stating that they had been instructed by Lord *Cowley* and the trustees of the late Lord *Mornington* to commence proceedings against the Defendant to restrain him "from using or appropriating the above-mentioned premises for a cemetery or burial-ground."

The Defendant's solicitors replied by a letter, the material parts of which were as follows:—

"We will first call your attention to our client's position. He holds the approval of the Home Secretary, dated the 12th of August, 1865, and from that time till the summer of last year he has been endeavouring to convert his property into a cemetery, but without success. Lord *Cowley's* surveyors both live close to the land in question, and have known for the last ten or eleven years of the repeated endeavours to turn this into a cemetery, and have seen each one fail. Our client does not intend to give up any of his legal rights, and we observe your letter is only written the day after the result of the public agitation at *Leyton* is known. We presume, therefore, that you deferred writing or taking any steps till you saw how our client was situated, and that the threat to commence immediate proceedings is only another step taken by you, doubtless, at the request of others, and really without the slightest necessity. You can quite understand that the public inquiry was harassing enough to Mr. *Byas* without having threats of Chancery suits or other proceedings, and we need only say that no part of our client's land within 100 yards of any dwelling-house would be used as a cemetery unless he had taken the necessary steps prescribed by the Act. Your client has rested for eleven years without raising the question before, and we do not see that there is any probability at present of any cemetery being established at *Leyton*, but, as before stated, our client declines to be dictated to in the matter, and will not give up any of his legal rights, although he may never wish to exercise them, and may never be in a position to form a cemetery in the spot approved by the Home Secretary. There is no necessity whatever for any proceedings being taken, as our client, under our advice, would not form it into a cemetery without ascertaining that all the provisions in the Act and approval had been complied with."

On the 28th of March Lord *Cowley's* solicitors replied:—

"You state that Mr. *Byas* declines to be dictated to in the matter, and will not give up any of his legal rights, although he may never wish to exercise them, and you add, that he would not form the land into a cemetery without ascertaining that all the provisions of the Act and the approval had been complied with. We think it right to repeat that such provisions have not been complied with, and as the establishing of a cemetery would, as we are advised, cause great damage to our client's estate, we beg to give you notice that unless Mr. *Byas* shall send us, through you, by the 10th of April next, a written undertaking that no part of the land the subject of the recent inquiry shall be used for a cemetery, we shall, without further notice, apply for an injunction."

On the 10th of April, 1877, the Defendant's solicitors wrote to Lord *Cowley's* solicitors as follows:—

"We have seen our client again to day with reference to the correspondence between us, and, as we before told you, he has no present intention whatever of attempting to convert his property into a cemetery, and in fact for some years past he had abandoned the idea until it was suggested to him by the vestry clerk of *Leyton* and some of his friends. You are no doubt very fully informed of all that took place at the recent inquiry, and we presume that in consequence of that you have been instructed to write and threaten proceedings on Lord *Cowley's* behalf. Our client declines to give any such undertaking as you wish; but under our advice he writes and repudiates any notion of attempting to convert the property into a cemetery, although at the same time he will not give up his right to do so at any future time, or admit for one instant that the grant he has obtained is invalid, or give any undertaking in the matter. This, however, he is willing to do to meet your views and to avoid litigation if possible: If at any future time he should be advised or wish to use his property as a cemetery, he will give you and your clients two months' notice of such his intention, so that you can, if you are so advised, take what proceedings you think proper and expedient in the matter."

Lord *Cowley* and his trustees thereupon issued a writ and moved

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for an injunction before Vice-Chancellor *Bacon* on the 3rd of May, 1877.

Kay, Q.C., and *Nalder*, for the motion.

Everitt, and *Edmund Beaumont*, *contrà*.

Judgment, V.-C. B.

BACON, V.C.:—

In my opinion the Plaintiffs are most clearly entitled to the injunction they ask for. Eleven years ago, or more, the Defendant got what he calls a grant from the then Secretary of State, and he would read it as if it repealed the Act of Parliament then in force, and the one which has since been passed. The grant is perfectly right; it is an authority to make a lawful cemetery; but it would be an authority to make an unlawful cemetery if it could be construed in the way for which the Defendant contends. Ever since he obtained that grant he has been threatening, and he threatens now, that when it seems good to him he will make a cemetery on the land, and, fastening on the words of the Act, he says that unless he buries within 100 yards of the Plaintiffs' house he does not infringe the Act. I think that the Act is plain, and that it is a mere idle quibble to say that no burials shall take place within 100 yards of the house, and that what is within that distance shall be planted with trees or kept as a garden. It would not be any the less a cemetery for that. The Plaintiff is entitled to his injunction.

An injunction was accordingly granted to restrain the Defendant "from using for burial or for a cemetery" the ground in question, "or any part of such land or ground," until judgment in the action or further order.

C. A.

The Defendant appealed. The appeal was heard on the 30th of May.

Argument.

Everitt (*E. Beaumont* with him), for the Appellant, having referred to 18 & 19 Vict. c. 128, s. 9, was stopped by the Court.

Kay, Q.C., and *Nalder*, for the Plaintiffs, referred to 15 & 16

Vict. c. 85, ss. 9, 25; 17 & 18 Vict. c. 87, s. 12; 18 & 19 Vict. c. 128, s. 9; and contended that, reading the Acts together, no ground within 100 yards of a dwelling-house could be appropriated as part of a cemetery. They contended, also, that the Defendant's obtaining leave from the Home Secretary to use the ground as a cemetery, and insisting on his right so to use it, was such a "threatening and intending" to do so as to entitle the Plaintiffs to an injunction: *Hext* v. *Gill* (1).

Argument.

JESSEL, M.R.:—

Judgment, C. A. Jessel, M.R.

The appeal in this case raises a question of considerable importance as regards the practice of the Court, as well as a question of some importance as regards the construction of the Acts of Parliament relating to burial-grounds. The first-named Plaintiff is the owner of a mansion-house within 100 yards of a portion of a field belonging to the Defendant, and the Defendant, Mr. *Byas*, is the owner in fee simple of this field. The Plaintiff alleges that the Defendant is about to use his land for the purposes of a cemetery, that is, to appropriate it or lay it out in some mode or other which will render it more eligible for the purposes of interment of dead bodies. The Defendant says that he has no immediate intention of doing anything of the kind; that he did in the year 1865 obtain the necessary permission of the Secretary of State to use his land for a cemetery, but that he has not been able to act on that permission, not having been able to form a company for the purpose of making the cemetery; that he has recently attempted to do so, but has not succeeded; and he also says that he does not intend to use any portion of the land within 100 yards of the Plaintiff's mansion or dwelling-house for the purposes of burial without obtaining the requisite consents; and, further, that in any case, before putting into exercise his rights, whatever they may be, he will give two months' notice to the Plaintiff to enable him to dispute, if he thinks fit, such rights as he alleges that he possesses. In that state of things the Plaintiffs bring an action for an injunction to restrain the Defendant from using for burial or for a cemetery his land or ground known as *Leyton Park*, in *Leyton*, in the county of *Essex*, or any part of

(1) Law Rep. 7 Ch. 699.

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Judgment, C. A. Jessel, M.R.

such land or ground, and the Vice-Chancellor has granted an injunction in those terms.

Now, in the first instance, it appears to me, as regards the practice of the Court, that even assuming the construction of the Act of Parliament to be favourable to the Plaintiffs, no such injunction ought to have been granted. The Defendant has not done anything whatever to the injury of the Plaintiffs. He alleges that he has the right to do something which, on the assumption I have mentioned, he would not have the right to do, but he says, not only have I no present intention to do it, but I undertake to give you two months' notice (and the reasonableness and sufficiency of such notice are not disputed) before I attempt to do anything of the kind. How can the Plaintiffs say in such a case that there is an immediate threat to do something which requires the interposition of the Court by injunction to prevent it? So far from there being a case for interlocutory injunction, the evidence shews that at the time when this injunction was granted there was not the remotest probability of the Defendant being able to make the cemetery, nor the remotest intention of making it. His attempts had failed; they had been discontinued for a series of years, and there was no intention of renewing them. It appears to me, also, that the Plaintiffs cannot say that they could not rely on the assurance of the Defendant. So far from that being the case, they offered to take his assurance in writing if he would give the assurance to the full extent they demanded, so that they did not come into Court saying, We cannot trust the Defendant. It seems to me, according to the ordinary practice of the Court, that there was no case either for bringing the action or for granting the injunction, and that on this ground alone it ought to be dissolved.

I have thus far assumed the construction of the Acts to be in favour of the Plaintiffs. The Vice-Chancellor, as I read his judgment, came to the conclusion that according to the terms of the Acts the Defendant had no right to convert any portion of his land into a cemetery, although the great bulk of the land was distant more than 100 yards from the mansion-house of the Plaintiffs, and although no portion of the land within the distance of 100 yards was intended to be used for the purposes of burial.

The ground I have already mentioned is sufficient to dispose of the case, but I think it right to state what is my view of the meaning of the Act. It must be observed that these Acts of Parliament give to neighbouring landowners a privilege in addition to their legal rights. As I understand the law, they could not before these Acts have prevented their neighbours from using their fee simple properties for the purposes of burial unless such user amounted to a nuisance; but when these Acts were passed, which give certain benefits to the public, and impose certain restrictions on landowners as regards the use of their land for the purposes of burial, with a view to the health of the public, it was thought right also to give landowners some privileges, and one privilege given by 15 & 16 Vict. c. 85, s. 25, was that "no ground not already used as or appropriated for a cemetery shall be appropriated as a burial-ground or as an addition to a burial-ground under this Act, nearer than 200 yards to any dwelling-house," without the consent of the owner and occupier of the dwelling-house. But by the Act 18 & 19 Vict. c. 128, s. 9, the portion that I have read of the former Act was repealed, and the words substituted were these: "No ground not already used as or appropriated for a cemetery shall be used for burials under the said Act or this Act, or either of them, within the distance of 100 yards from any dwelling-house" without such consent as above. Therefore all that is prohibited is the use for burials of the ground within the distance. I cannot find any pretence for saying that there is any prohibition as regards any ground beyond the distance, and therefore, so far as the injunction extends to prohibit the use of the ground as a burial-ground beyond the distance, I find nothing in the Act of Parliament to warrant it.

But, then, what is the meaning of the words "used for burials"? On the one side it is said they mean used as a cemetery, and have the same effect as the words which were used in the former Act, "appropriated as a burial-ground or as an addition to a burial-ground." The mere appropriation was prohibited by those words, but in the present Act we have different words. Now the words "used for burials" are words commonly understood to refer, and which properly refer, to actual burials within the ground, and they

C. A. 1877 LORD COWLEY v. BYAS. Judgment, C. A. Jessel, M.R.

are so used over and over again in various sections of the former Act, to which the Lord Chief Justice has directed my attention, so that we find a change of words combined with a change of distance. The appropriation was prohibited within 200 yards; the Act 17 & 18 Vict. c. 87, s. 12, changed the distance to 100 yards, and the last Act uses different words to denote the act prohibited. Therefore we come to this, that the Legislature has taken away to a certain extent the privilege before granted to landowners, for it has changed the original 200 yards into 100 yards, and it appears to me it has altered it in another way by saying in fact, "All the protection you want is a protection against nuisance; if so much of the cemetery as is within 100 yards of your house is laid out as a park, or garden, or a chapel, or for some other purpose of that kind, and not for actual burials, we do not intend to give you the right to prohibit its being so used because such use does not hurt you;" and it must be remembered that under the first Act there is an express provision (sect. 30) enabling the burial board to lay out and embellish the burial-ground, and also to erect a chapel upon any portion of it, shewing that the Legislature were well aware that the whole of the burial-ground was not used for the purposes of actual burial. It seems to me, therefore, that when we look at the reason of the thing and the change of language of the Legislature, it is reasonably plain that the Legislature intended not to give the extensive privilege claimed by the Plaintiffs in this case, but merely the right to prevent burials in the burial-ground within 100 yards of the dwelling-house, and therefore, upon the point of law, as well as for the other reason I have given, I think this injunction ought not to have been granted.

Lord Coleridge, C.J.

LORD COLERIDGE, C.J.:—

I am entirely of the same opinion, and for the same reasons. I would only add an additional argument, which appears to me to arise in confirmation of those which the Master of the Rolls has used in favour of the construction, which I agree with him in considering that we ought to put on these Acts. The 12th section of the 17 & 18 Vict. c. 87, which varies the distance limited by 16 & 17 Vict. c. 85, s. 25, repeats the words of the earlier section,

only varying the distance. The third Act, while retaining the same limit of distance as the second Act, substitutes for the words "shall be appropriated as a burial-ground or as an addition to a burial-ground" the words "shall be used for burials." This alteration of the words shews that the clause in the third Act pointed at something different from what was pointed at in the similar clauses of the first and second Acts.

BAGGALLAY, L.J.:—

I also agree in the view expressed by the Master of the Rolls, and in the reasons he has given for discharging the order for the injunction; and I think we have only to look at the provisions contained in the clauses of the several Burial Acts, beginning with the 15 & 16 Vict. c. 85, to see how clearly the word "burial" is used as denoting actual interment. We find "burial-grounds," "places of burial," and "cemetery" used almost interchangeably, but we constantly find the expression "burials" by itself, the Act appearing to use the words "burial" and "interment" indifferently. Thus, for instance, in sects. 2, 4, 5, and 7, the word "burials" clearly refers to actual burial. It appears to me, therefore, that the 18 & 19 Vict. c. 128, s. 9, intended to do away with the previous rule, that no portion of the cemetery should be within a certain distance of a dwelling-house, and to substitute an enactment that no bodies should be interred within 100 yards of any dwelling-house. I also agree with what the Master of the Rolls has said, that if the law had been as the Plaintiffs contend, still there is no ground made here on the facts of the case for the interference of the Court.

Solicitors: *Collyer-Bristow, Withers, & Russell; Lowless & Co.*

C. A.
1877
June 13.

GREENWOOD *v.* GREENWOOD.

[1877 G. 65.]

Will—Construction—Inconsistent Clauses—Omission supplied.

A testator directed his trustees to convert his property and invest the proceeds, and then went on: "And I declare that the said trustees or trustee may vary the said stocks, funds, shares and securities at their or his discretion, and shall pay the moneys and the investment for the time being representing the same to my said wife during her life upon trust for all my children or any child who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry, and if more than one in equal shares." He then empowered the trustees, after the death of his wife or previously by her direction, to raise any sums not exceeding half the expectant share of any child for his or her advancement, and to apply the income of each child's expectant share for maintenance after the death of his wife; and if no child, being a son, should attain twenty-one, or, being a daughter, attain that age or marry, the fund was given over after the death of the widow:—

Held (reversing the decision of the Master of the Rolls), that the widow took a beneficial interest for life in the fund.

Statement.

THIS was an appeal from a decision of the Master of the Rolls on a special case.

H. Greenwood, by will dated the 12th of July, 1872, gave his real and personal estate to trustees upon trust to sell, call in, and convert the same into money, and out of the proceeds and out of his ready money to pay his funeral and testamentary expenses, debts, and legacies, and to invest the residue as therein mentioned; and then proceeded as follows:—

"And I declare that the said trustees or trustee may vary the said stocks, funds, shares, and securities at their or his discretion, and shall pay the moneys and the investment for the time being representing the same to my said wife during her life, upon trust for all my children or any child who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry, and if more than one in equal shares. Provided also that the said trustees or trustee may, after the death of my said wife, or previously thereto if she

shall so direct in writing, raise any part or parts not exceeding one half part of the then expectant presumptive or vested share or fortune of any child under the trusts hereinbefore declared, and apply the same for his or her advancement or benefit. And I hereby declare that the said trustees or trustee shall, after the death of my wife, apply the whole or such part as they or he shall think fit of the annual income of the share or fortune to which any child shall for the time being be entitled in expectancy under the trusts hereinbefore declared for or towards the maintenance or education of such child, either directly or to his or her guardians or guardian, without seeing to the application thereof or requiring any account of the same, and shall, during the suspense of absolute vesting, accumulate the residue (if any) thereof in the way of compound interest by investing the same and the resulting income thereof in or upon any such stocks, funds, shares or securities as are hereinbefore mentioned for the benefit of the person or persons who, under the trusts herein contained, shall become entitled to the principal fund from which the same respectively shall have proceeded, with power for the said trustees or trustee to resort to the accumulation of any preceding year or years, and apply the same for or towards the maintenance or education of the child for the time being presumptively entitled to the same respectively. And if there be no child of mine living at my death who, being a son, shall attain that age or marry, then, from and after the death of my said wife and such default or failure of children, I bequeath the said moneys and the investments representing the same, or so much thereof as shall not have become vested or been applied under the trusts aforesaid, unto my brothers and sisters, to be divided in equal shares."

The will contained a power of appointing new trustees exercisable by the widow during her life, and after her death by the surviving or continuing trustees or trustee, or by the last retiring trustees or trustee.

The testator died in January, 1877, leaving him surviving his wife and two infant daughters.

The Master of the Rolls decided that the widow had no beneficial interest in the income, and that the infants were entitled to the corpus of the property contingently on their attaining

C. A. 1877

GREENWOOD v. GREENWOOD.

twenty-one or marrying, and in the meantime were entitled to the income by way of maintenance. The widow appealed.

Cookson, Q.C., and *Eyre*, for the Appellant, referred to *In re Daniel's Settlement* (1); *Stevens* v. *Hale* (2); *Cock* v. *Cock* (3); *Key* v. *Key* (4); *Sweeting* v. *Prideaux* (5); *Langston* v. *Langston* (6); *Abbott* v. *Middleton* (7); *Parker* v. *Tootal* (8).

Davey, Q.C., and *Everitt*, for the children.

Cookson, in reply.

Judgment, James, L.J.

JAMES, L.J.:—

After the full discussion which this case has had, I am of opinion that we can give effect to the intention which there can be no more doubt of the testator's having had than if he had expressed it in the plainest words. We are not bound by the strict meaning of words when the context shews it to be contrary to the true meaning of the testator. Here we not only see that the words do not express the true meaning, but we can see what the true meaning was. I agree that if the will had ended with the gift to the children in equal shares, it would have been difficult, if not impossible, to alter the natural meaning of the words which import a gift to the wife during her life upon trust for the children, so giving the children no more than an estate *pur autre vie*. But we then find an advancement clause enabling the trustees, after the death of the widow, to advance part of the share of a child under the trusts thereinbefore declared, and then a clause empowering the trustees, after the death of the widow, to apply the income of the expectant share of any child under the trusts thereinbefore declared. When we read these powers, which are powers dealing with what the testator treats as already given to the children, it is evident that the natural meaning of the previous words of gift cannot be the true one, these powers being utterly inconsistent with the view that the previous trust for children was one

(1) 1 Ch. D. 375.
(2) 2 Dr. & Sm. 22.
(3) 21 W. R. 807.
(4) 4 D. M & G. 73.
(5) 2 Ch. D. 413.
(6) 2 Cl. & F. 194.
(7) 7 H. L. C. 68.
(8) 11 H. L. C. 143.

determining with the widow's life; we are therefore driven to separate the words in the gift to the children from the gift to the wife for life, the words "after her death" being implied after the gift of her life estate. This seems the only way in which we can correct the words, and we are bound somehow to correct them in order to avoid a manifest inconsistency. The trusts as they stand are absurd in directing the trustees to pay the moneys and investments to the wife; the income only can have been intended. Again, it is absurd to appoint trustees, and yet, during the life of the wife, who has no beneficial interest, to order the income to be paid to her. Again, we find everything in the will consistent with the wife's having a life interest, and many things which are not practically consistent with her not having one. The direction of the wife is made necessary to the exercise of the power of advancement during her life, and the gift over on failure of children is not to take effect until after her death. The strict construction of the first clause of the will produces inconsistency, and if it cannot be corrected in the way I have said, the only alternative is to hold the entire set of trusts void for uncertainty.

BAGGALLAY, L.J.:—

I understand that the Master of the Rolls proceeded on the grammatical construction of the testator's language. We have not had the advantage of hearing his Lordship's judgment read, but if the question had turned on the true construction of the first clause ending with the words "and if more than one in equal shares," I should have had great difficulty in dissenting from his conclusion. Taking that clause alone, I could have come to no other conclusion than that the testator had given a life interest to his widow upon trust for his children. It is indeed very singular that a life estate should be given in trust, not for all the children, but only for those who attain twenty-one or marry, but that consideration would not be enough to enable us to vary the natural meaning of the words. But when we go further we see that this cannot have been his intention, and we see clear indications that he meant his widow to have a life interest. A power is given of advancing children after the death of the widow, or previously if she should so direct. If the widow had no interest, why should

C. A. 1877 GREENWOOD v. GREENWOOD. Judgment, Baggallay, L.J.

the exercise of the power be postponed till her death, or made dependent on her consent? Then, again, why should maintenance be postponed till her death if she had no interest? Then, again, the gift over on failure of children is not to take effect till the death of the wife. These three clauses drive us to the conclusion that the wife was intended to have a life estate. Is this intention sufficiently expressed to enable us to give effect to it, or must we hold the trusts void for uncertainty? We ought not to do so if the words of gift can bear a construction giving the wife a life estate; and I think that reading them as the Lord Justice proposes they will bear it. The words may be taken as broken up into separate paragraphs in the way in which instructions for a will are often written, the trust for the children being a separate paragraph, and the words connecting it with the previous limitations being omitted.

Bramwell, L.J. BRAMWELL, L.J.:—

I am of the same opinion. It is a trite remark that we are not to make a will for a testator, which is to be understood as meaning that we are not to interpret a testator's language by considering what it is likely that he intended. We are, however, at liberty to look to surrounding circumstances, and I am not sure that we may not look at the circumstance that the construction of the will which was adopted by the Master of the Rolls leaves the widow without any provision. We find from the last clause that it is not till after the death of the widow that the property is to go over to the testator's brothers and sisters, so that if no interest is given to the widow there is a partial intestacy. Then, again, according to this construction, there is a power of advancing children when there has been no gift of capital to them. Then, again, there is a power of applying the income for maintenance and education after the death of the wife, but no provision for their maintenance and education during her life. It is said he trusted to her maintaining them, but what he had given her was saddled with a trust, so that she could not do anything for the children. Reading the clauses of the will in reverse order, we should, from these things, come to a confident expectation of finding in the former part of the will some clause giving a life interest to the widow, and they justify us in

departing from what would have been the natural meaning of the first clause, if standing alone, for the purpose of giving effect to the intention thus obviously indicated. I think that a full pause ought to be made after the words "during her life," and the declaration of trust treated as applying to the fund after that period.

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Solicitors: *Layton & Jaques.*

In re PARIS SKATING RINK COMPANY.

C. A. 1877 *June* 15.

Maintenance of Suit—Assignment of Right to proceed with Winding-up Petition—Fraud on the Companies Acts.

A creditor of a company being unable to obtain payment of his debt presented a petition to wind up the company. Before the petition was heard he sold his debt and the right to proceed with the petition to a shareholder of the company, who obtained leave to amend the petition by making himself a co-Petitioner:—

Held, that the sale of the right to proceed with a winding-up petition ought not to be allowed, and the petition was dismissed.

The order of Vice-Chancellor *Hall* discharged.

Statement.

THIS was an appeal from an order of Vice-Chancellor *Hall* for winding up the *Paris Skating Rink Company, Limited*, carrying on business in *Paris* and *London*.

A petition for winding up the company was presented on the 17th of April, 1877, in the Court of Vice-Chancellor *Malins*, by *Charles Powys*, an engineer. It stated certain advances by Lord *Monson*, one of the directors, and a mortgage of the property of the company to Mr. *Toynbee*, Lord *Monson's* solicitor, for securing repayment thereof; and stated that the creditors of the company resident in *France* had taken proceedings in the Courts of that country against the company, and that a receiver had been appointed by order of such Courts; that the company was indebted to the Petitioner to the amount of £1116 3*s.* 7*d.* for goods delivered to them; and that he had served a demand on them at their office, but they had neglected to pay him.

That petition was supported by the statutory affidavit, and the

C. A. 1877 — *In re* PARIS SKATING RINK COMPANY.

Statement.

necessary advertisements were issued. In the meantime, on the 24th of April, another petition by Mr. *Toynbee* was presented for winding up the company in Vice-Chancellor *Hall's* Court.

On the 25th of April *Powys* executed an indenture, whereby, in consideration of £1766 3*s.* 7*d.*, he assigned the said debt and two other debts due from the company, amounting to £650, to *Albert Vickers*, a holder of 200 shares in the company. At the same time *Vickers* paid *Powys* all costs of the petition up to the date of the assignment. When the petition came on to be heard on the 28th of April the Petitioner *Powys* obtained leave for the petition to stand over, with leave to amend the petition; and also an order that it should be transferred to the Court of Vice-Chancellor *Hall*, so as to be heard with *Toynbee's* petition.

The petition was then amended by making *Vickers* a co-Petitioner with *Powys*, striking out all the statements relating to the advances by Lord *Monson* and the mortgage to *Toynbee*, and stating the assignment of the debt to *Vickers*. An order was also obtained for changing the Petitioner's solicitor; but no fresh advertisements were issued.

The amended petition came on to be heard before Vice-Chancellor *Hall*, together with *Toynbee's* petition, on the 11th of May, when the Vice-Chancellor made an order on the petition of *Powys* and *Vickers* to wind up the company, and dismissed the petition of *Toynbee* as being unnecessary.

Some of the shareholders, Messrs. *Jeffree* and others, who had opposed the petition before the Vice-Chancellor, appealed from the order. Mr. *Mair*, another shareholder, also presented a separate appeal.

Argument.

Dickinson, Q.C., and *Everitt*, for Messrs. *Jeffree* and others:—

At the hearing before the Vice-Chancellor we opposed the petition on the ground that the debt was payable by instalments. But we now make another objection to the petition, namely, that the petition was one on which the Court ought not to make any order on grounds of public policy. It is in fact the petition of a partner who has purchased a debt for the purpose of destroying the partnership. Such a petition is contrary to the laws against

champerty and maintenance, and a fraud upon the Companies Acts: *Harrington* v. *Long* (1); *Ex parte Hawkins* (2). Moreover, the petition is irregular; for the amended petition, in which both *Powys* and *Vickers* are made Petitioners, has never been advertised. Nor has *Vickers* any authority to use *Powys'* name as a co-Petitioner. *Powys* has no desire to proceed with this petition, and the solicitors representing *Vickers* have no authority to act for him.

Mr. *Powys*, in answer to a question by the Court, said that he did not desire a winding-up order, and had not done so when the matter was before Vice-Chancellor *Hall;* and that he now withdrew all authority for the use of his name in the proceedings.

Robinson, Q.C., and *Owen*, for Mr. *Mair*, also opposed the winding-up order.

Knox, for the company.

W. Pearson, Q.C., and *Howard*, for the Petitioner *Vickers*:—

Mr. *Powys* never withdrew his authority before the petition was heard before the Vice-Chancellor, and the matter having been brought on, the other creditors have an interest in the matter. There was no occasion to re-advertise the petition; the only object of the advertisements is that the shareholders and creditors may know when the petition comes on, and in the present case they were all represented at the hearing. If the objection as to the advertisements had been made at the hearing, a new advertisement might have been ordered, or the advertisements might have been dispensed with, which the Court has power to do under the 53rd rule of the General Order of November, 1862; *In re City and County Bank* (3). It is, therefore, now too late to make the objection.

Hastings, Q.C., and *Brice*, for *Toynbee*:—

There is nothing contrary to public policy in a creditor parting with his debt *pendente lite*. Such a case is contemplated by Order L., rule 3, which provides that in case of an assignment

(1) 2 My. & K. 590. (2) 28 L. J. (Ch.) 830.
(3) Law Rep. 10 Ch. 470.

C. A. 1877 *In re* PARIS SKATING RINK COMPANY.

pendente lite an action may be continued by the assignee. The same rule holds good with respect to a petition: *In re Atkins' Estate* (1).

E. Cutler, for other creditors, in support of the petition.

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion that we ought not to allow the order of the Vice-Chancellor to stand, on this plain and simple ground—this is the first instance since the Companies Acts were passed in which such an experiment has been tried, that is to say, of a creditor presenting a petition for winding up with a view of obtaining payment of his debt, and then of a member of the company, for some purpose or other, buying from the debtor the right to proceed with that petition. This has never been done before, and I think it ought to be discouraged, because to my mind it is impossible to foresee the amount of mischief and oppression that might be occasioned if a person were allowed to come in and buy up the right to proceed with a winding-up petition. Upon that simple ground—that such a thing never has been and never ought to be done—I am of opinion that the Vice-Chancellor's order ought to be discharged; but as this point was not taken in the Court below, and is now raised for the first time, the order will be discharged without costs.

Baggallay, L.J.

BAGGALLAY, L.J.:—

I agree that the order ought to be discharged on the ground stated by the Lord Justice.

Bramwell, L.J.

BRAMWELL, L.J.:—

I am of the same opinion. I should not like it to be supposed that the assignee of a debt due from a company cannot take proceedings for winding up the company; but my objection to this petition is the same as that stated by Lord Justice *James*, that *Vickers* was the assignee, not merely of *Powys'* claim against the company, but also of his right of proceeding with the petition to wind up the company. I doubt whether in a common law action

(1) 1 Ch. D. 82.

such an assignment might not be good, because the person who had purchased the right would have stood on the same footing, and have been subject to the same answer in the action as the original debtor. But however that may be, I think that this case gives rise to different considerations, because the assignor might be subject to an answer which the assignee was not subject to. On the ground that we ought not to permit the assignment of a debt, together with the right to proceed with a petition to wind up which has been brought in respect of such debt, I concur in holding that the order of the Vice-Chancellor must be discharged.

C. A. 1877 *In re* PARIS SKATING RINK COMPANY. Judgment, Bramwell, L.J.

Solicitors: *J. Fraser; J. & R. Gole; Combe & Wainwright; Varley & Toynbee; G. S. & H. Brandon.*

In re EAST NORFOLK TRAMWAYS COMPANY.

BARBER'S CASE.

C. A. 1877 M. R. *Feb.* 3. C. A. *June* 11.

Winding-up—Contributory—Director—Election of Person disqualified from being a Director.

It was provided by the articles of a company that no person not recommended by the board of directors for election as a director should be eligible unless at the time of election he had held twenty shares for two months. *B.*, who was not a shareholder, agreed to become a director, and was unanimously elected at a general meeting at which six of the seven directors, who were then the only shareholders, were present. *B.* did not act as a director, and before anything further had been done he wrote refusing to be connected with the company. The company nevertheless sent him a letter of allotment for twenty shares, of which he took no notice. The company was afterwards ordered to be wound up:—

Held, by the Master of the Rolls, and by the Court of Appeal, that the fact that six of the seven directors voted for *B.* at the general meeting did not amount to a recommendation by the board, as they were not met in the capacity of directors; that *B.*'s election was, therefore, void, and that he was not a contributory.

Forbes' Case (1) and *Stephenson's Case* (2) distinguished.

THE *East Norfolk Tramways Company, Limited*, was registered in December, 1870, with a capital of £25,000, divided into 12,500

Statement.

(1) Law Rep. 19 Eq. 353. (2) 45 L. J. (Ch.) 488.

C. A. 1877 BARBER'S CASE. Statement.

shares of £2 each. The articles provided that the seven subscribers of the memorandum of association should be the first directors, and should retire from office at the first general meeting. No application was made to the public to take shares, and nothing was done to float the company until July, 1872, when special resolutions were duly passed and confirmed increasing the capital of the company to £100,000, divided into shares of £10 each, rescinding the articles and substituting a fresh set of articles, which contained the following clauses relating to the directors:—

"105. The qualification of every director shall be the holding in his own right of twenty shares."

"107. A shareholder not being recommended by the board for election as a director shall not be qualified for the office of director unless at the time of his election and also during two consecutive months next before his election he be the registered holder of at least twenty shares.

"108. Every director shall vacate his office if he cease to be a holder of twenty shares, if he holds any other office or place of profit under the company, if he becomes bankrupt or makes any arrangement with his creditors whereby he pays them less than 20*s.* in the pound . . . . or if he absents himself from the committee during the whole of six consecutive months without special leave of absence from the board.

"109. Provided that all acts done by any person assuming to be a director shall, notwithstanding his being improperly elected, his being disqualified or ceasing to be qualified, be a valid and effectual act against himself, but in favour of the company and all other persons as if he were duly elected and qualified."

"114. Directors in the place of the retiring directors shall be elected by the shareholders at the ordinary meeting at which they retire, but if from any cause the election be not had, or be not completed at that meeting, it may be had or completed at an extraordinary meeting.

"115. No person other than a retiring director shall be elected a director at any general meeting unless not less than twenty-one days' nor more than two months' notice in writing under his hand of his willingness to be elected a director at the meeting be left for the secretary at the office."

On the 22nd of October, 1872, the secretary wrote to Mr. *Barber* asking him to accept a seat on the direction. After some further communication, *Barber*, on the 4th of November, 1872, wrote to the secretary a letter, in which he said: "It may be of use to you to know that I shall be willing to join your board if Mr. *Walpole* also consents to act."

On the 5th of November, 1872, the secretary wrote to *Barber* as follows:—

"I have this morning received a letter from Mr. *Walpole* appointing Saturday next, at 2.30, for a meeting at the *Royal Hotel, Norwich*. I shall endeavour to have a full board meeting, and shall be glad if you can make it convenient to attend."

A meeting was accordingly held on Saturday, the 9th of November, 1872, at which Mr. *Walpole* and *Barber* were present. At this meeting a prospectus was settled, which was to be issued to the public, and their names were inserted as directors in the prospectus. At this time no application had been made for shares, and the only members of the company were the seven subscribers of the memorandum of association.

Another meeting of directors took place on the 12th of December, 1872, for considering tenders which had been sent in for the execution of part of the company's works, and a tender by a Mr. *Furness* was accepted.

The secretary deposed that Mr. *Barber* took part in the proceedings at these meetings, which appeared to have been of a very informal character, and that he acted as a director. Mr. *Barber* stated, on the contrary, that he did not consider it a meeting of directors, and that he and other persons who had been invited to become directors only attended it for the purpose of hearing and discussing the arrangements which were being made in order to see whether they would become directors.

A meeting of the company was held on the 23rd of December, at which six of the seven members of the company were present, and they unanimously elected Mr. *Barber* and four other gentlemen to be directors in the place of the seven subscribers to the memorandum.

On the 8th of February, 1873, the secretary wrote to Mr. *Barber*

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a letter inclosing a form of application for shares, requesting him to fill it up and return it in time for the board meeting on Thursday then next (the 13th of February), on which day the directors would proceed to an allotment.

Statement.

Mr. *Barber*, who was abroad at the time, did not reply till the 1st of March, when he wrote to the secretary, declining to be on the board of directors, to take shares, or to have any further connection with the company.

On the 4th of March, 1873, the directors allotted to Mr. *Barber* twenty shares in the company, and sent him notice of the allotment, to which he paid no attention.

An order having been made to wind up the company, the official liquidator applied to settle Mr. *Barber's* name on the list of contributories for twenty shares. The summons was adjourned into Court, and was heard before the Master of the Rolls on the 3rd of February, 1877.

Davey, Q.C., and *Crossley*, for the official liquidator.

Buckley, for Mr. *Barber*.

Judgment, M.R.

JESSEL, M.R.:—

As I understand the authorities, if it is a condition precedent to the election of a man as director that he shall hold a certain number of shares as a qualification, or shall have held them for a given time, and he is elected without the qualification, and never agreed otherwise to take shares, he is not a shareholder and not a contributory. That is considered by me to be settled by authority. The question, therefore, that I have to decide in this case, and the only question, is whether there was such a condition precedent as regarded Mr. *Barber*.

Now the facts that it is necessary to state are very few and very simple.

The company was formed with seven members in the usual way, who thereby became the first directors, and they were, by articles which were about two years afterwards repealed, made the first directors. But after the repeal they continued to act as directors, and, as I understand, they were very good directors; indeed they were willing to act certainly until the first general

meeting. They attended the meeting of the board of directors in the regular way, and then there was a general meeting, at which Mr. *Barber*, who consented to be a director if Mr. *Walpole* would consent to be a director, was elected unanimously. The meeting, as I understand, was attended by six shareholders, being six out of seven, and also six out of seven directors. Then Mr. *Barber* some time afterwards changes his mind and writes to say that he will not be a director and will not take any shares. Notwithstanding that, the directors put him on the list of shareholders, and they sent him the allotment, I suppose, and they register him as a shareholder, and then the company is wound up. They sought to make him a shareholder for twenty shares, which was the qualification of a director. He says: "It was necessary before I could be elected that I should hold the shares two months, and I never held any." The whole question depends upon whether that is decided in his favour, as I think it ought to be.

The 107th article of the articles of association is this:—[His Lordship read it.] Mr. *Barber* was not recommended by the board. There was a board meeting before, but he was not recommended by the board meeting, or by any other meeting, and consequently not being recommended by the board, he was not qualified to be elected, unless the argument that has been insisted on on behalf of the Respondents should prevail. That argument is this: that the great majority of the board—six out of seven—was a majority attending a shareholders' general meeting which elected Mr. *Barber*, that inasmuch as they elected him they of course would have recommended him, and that therefore it is equivalent to being recommended by the board. First of all, he was not recommended by the board of directors. Six directors out of seven met in a different capacity and for a different purpose, and such a meeting does not make them a board of directors. Moreover, the whole seven did not meet, and it may well be—I do not say that it was so—that the seventh, who did not attend, stayed away from the shareholders' meeting because he knew that no director could be elected except persons qualified as mentioned in the articles, and that therefore nobody could be elected except himself and his present colleagues. He had a right to say this: "That was a bad election; I have not been consulted, and if I had

C. A. 1877 BARBER'S CASE. Judgment, M.R.

been consulted and summoned to a board meeting I might have attended." And then the six might not have attended. I do not know what the quorum is: there might not have been more than sufficient to make a quorum. It by no means follows that if a board meeting had been summoned, and the seventh had attended, the seven would have come to the same conclusion as the six without him. People are very apt to change their minds when they hear arguments, and perhaps the present case is an illustration of it, because the argument presented to me was not presented to my Chief Clerk, and I have little doubt that if it had been he would have come to the same conclusion that I do. Then it might well be that the absent director might have known something against the person proposed, and that if he had stated it to the board of directors they would have entirely changed their minds. It cannot be said that there was, either in substance or in form, a recommendation by the board, and consequently this gentleman was not eligible as a director, and cannot be put upon the list.

C. A.

The official liquidator appealed. The appeal was heard on the 11th of June.

Argument.

Crossley, for the Appellant, referred to *Stephenson's Case* (1), *Forbes' Case* (2), and *Lord Claud Hamilton's Case* (3), and contended that if the holding shares was a condition precedent to being elected a director, it did not lie in the Respondent's mouth to say that it had not been complied with.

Buckley, contrà, was not called upon.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

Mr. *Barber* was not qualified to be elected a director, and his election was absolutely null and void. Before anything had been done under it he absolutely refused to become connected with the company. If he had acted as a director there might have been an estoppel. He cannot be considered to have acted as such, he was merely called in to consult about a scheme in which it was

(1) 45 L. J. (Ch.) 488. (2) Law Rep. 19 Eq. 353.
(3) Law Rep. 8 Ch. 548.

intended that he should be a director. The general meeting could not do away with the necessity of a recommendation by the board to make him eligible to be a director.

C. A. 1877 BARBER'S CASE.

BAGGALLAY, L.J.:—

Judgment, C. A. Baggallay, L.J.

Mr. *Crossley* has relied on cases somewhat similar in their circumstances to the present, in which a person having agreed to become a director was held to have thereby agreed to take the shares which it was necessary for a director to hold, but in all those cases the party was a person who was not disqualified from being elected.

BRAMWELL, L.J.:—

Bramwell, L.J.

I am of the same opinion.

Solicitors: *Carr, Bannister, Davidson, & Morriss; Doyle & Sons.*

VALE *v.* OPPERT.

C. A. 1877 *June* 20.

[1873 V. 2.]

Practice—Vexatious Appeal—Staying Proceedings.

A Defendant against whom a decree for payment of a sum of money had been made, filed a petition for liquidation. A resolution for liquidation by arrangement was passed and registered, and a trustee appointed. After these proceedings the debtor, who had not obtained his discharge, appealed against the decree. The Plaintiff moved before the Court of Appeal to stay proceedings under the appeal:—

Held, that an order ought to be made staying the proceedings, as being vexatious.

Statement.

BY the decree in this suit, made on the 31st of July, 1876, it was declared that the Defendants *Oppert, Delblanco, Lonsdale, Ogle,* and *Hartmont,* were jointly and severally liable to pay to the Plaintiff the sum of £1000 with interest and his costs of the suit, and payment on or before the 31st of August was ordered accordingly.

On the 27th of July *Ogle* filed his petition in the Bankruptcy

C. A. 1877 VALE v. OPPERT.

Court for liquidation by arrangement, and on the 24th of August, 1876, resolutions for the liquidation of his affairs by arrangement and for the appointment of a trustee were passed. These resolutions were registered on the following day. The Plaintiff *Vale* proved for the £1000 and interest on the 24th of August.

Statement.

On the 29th of May, 1877, *Ogle*, who had not obtained his discharge, served notice of appeal from the above decree.

The Plaintiff moved that all further proceedings on the appeal might be stayed, and that the appeal might be struck out of the list of appeals. It appeared, however, at the hearing of the motion, that the appeal had not been set down.

Argument.

Romer, for the motion:—

An uncertificated bankrupt who has no *locus standi* ought not to be allowed to harass the Plaintiff with this purely vexatious proceeding.

Terrell, for the Appellant:—

There is no precedent for this application. The appeal ought to be allowed to come on in its regular course, when it may appear that the Appellant has a *locus standi*. He may by that time have paid 20*s.* in the pound; for anything that appears, he may be a trustee; and, at all events, he has a present interest, since it may have a material effect as to his obtaining his discharge whether the proof for this sum stands or not.

Judgment.

JESSEL, M.R.:—

This appeal is simply vexatious, and ought not to be allowed to proceed. It is the case of an uncertificated bankrupt appealing from an order establishing against him a money demand which has been proved against his estate. An order will be made to stay proceedings, and *Ogle* must be ordered to pay the costs.

JAMES and BRAMWELL, L.JJ., concurred.

Solicitors: *Lawrance, Plews, & Co.; Elmslie, Forsyth, & Sedgwick.*

Ex parte LANG. *In re* LANG.

C. A.
1877
July 5.

Composition—Dissentient Creditor—Debt not properly inserted in Debtor's Statement of Affairs—Enforcing Judgment against Debtor—Effect of attending Meeting, proving Debt, and opposing Registration of Resolutions—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 126—*Bankruptcy Rules*, 1870, *rr.* 273, 284.

On the 24th of April *B.*, the Plaintiff in an action, recovered judgment for £53 and costs. On the 25th of April the Defendant filed a liquidation petition. In his statement of affairs he inserted *B.* as a creditor for the £53, but made no mention of the costs. The first meeting of the creditors was held on the 19th of May. *B.* attended and proved a debt of £203, being the £53, and £150, the estimated amount of the costs. The meeting was adjourned to the 29th of May, when the creditors resolved to accept a composition, *B.* voting in the minority. On the 8th of June the costs of the action were taxed at £147. On the 9th of June *B.* gave notice to the debtor that he withdrew his proof, and the same day he issued execution against the debtor for the judgment debt and costs. On the 11th of June the second meeting of the creditors was held, and *B.* then gave written notice that he withdrew his proof, without prejudice to again proving on a subsequent occasion. The chairman refused to take the proof off the file. The composition resolutions were confirmed. *B.* took objections to the resolutions, and opposed their registration, but the registration was made:—

Held, that, by reason of the insufficient statements of *B.'s* debt in the debtor's statement, *B.* was not bound by the composition, and that he was not estopped by his conduct from enforcing his execution against the debtor.

Campbell v. *Im Thurn* (1) distinguished.

Statement.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, sitting as Chief Judge in Bankruptcy.

On the 25th of April, 1877, *David Lang*, a merchant, filed a liquidation petition in the *London* Bankruptcy Court. On the 24th of April, 1877, *James Buckingham* had recovered judgment against *Lang*, in an action in the Common Pleas Division for goods sold and delivered, for £53 8*s.* 3*d.* and costs. In his statement of affairs the debtor entered *Lang* as a creditor for £53 8*s.* 3*d.*, saying nothing about the costs, as they had not then been taxed. On the 2nd of May application was made to the Court of Bankruptcy to restrain *Buckingham* from further proceeding under his judgment, and he then undertook not to

(1) 1 C. P. D. 267.

C. A. 1877 *Ex parte* LANG. *In re* LANG.

Statement.

proceed further than signing judgment and taxing the costs until the 23rd of May. On the 19th of May, the first meeting of the creditors was held. *Buckingham* attended the meeting, and proved a debt of £203 8*s.* 3*d.*, being the judgment debt, and £150 the estimated amount of the costs of the action. The meeting was adjourned to the 29th of May, and at the adjourned meeting the creditors resolved to accept a composition of 2*s.* in the pound. *Buckingham* was a dissentient. On the 8th of June the costs of the action were taxed at £147 13*s.* 4*d.* On the 9th of June *Buckingham's* solicitors gave notice to the debtor's solicitor that they withdrew the proof tendered at the first meeting. On the same day *Buckingham* issued a writ of execution against the debtor, and lodged it with the Sheriff, and an interim injunction was granted by the Court, restraining *Buckingham* till the 14th of June from proceeding under the execution. The injunction was afterwards continued to the 28th of June. The second meeting of the creditors was held on the 11th of June. *Buckingham's* solicitor attended on his behalf, and handed to the chairman a written notice that *Buckingham* withdrew his proof, without prejudice to again proving his debt on any subsequent occasion. The solicitor requested the chairman to take the proof off the file, but he declined to do so. The composition resolutions were duly confirmed. At the close of the meeting *Buckingham's* solicitor handed to the chairman a written notice of objections to the registration of the resolutions, and on the 21st of June these objections were heard by Mr. Registrar *Keene*, and were overruled, and the resolutions were registered on the 23rd of June. On the 28th of June the debtor applied to the Court to make the injunction perpetual. The application was refused by the Registrar.

The debtor appealed.

Argument.

E. C. Willis, for the Appellant:—

Buckingham has acted as if he was bound by the resolutions. After his attempt to withdraw his proof he objected to the registration of the resolutions, which he was only entitled to do in the character of a creditor.

[JAMES, L.J.:—A secured creditor can object to the registration.]

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Argument.

He cannot be allowed to blow hot and cold. By rule 273 of the *Bankruptcy Rules*, 1870, a proof can only be withdrawn at the meeting at which it is tendered. After the meeting it can only be withdrawn by the leave of the Court. By rule 284 all proofs must be filed in Court within three days. *Ex parte Peacock* (1) shews that the debtor is bound to pay the composition upon the amount of the debt mentioned in his statement. The principle of the decision in *Campbell* v. *Im Thurn* (2) applies. *Buckingham* by his conduct has led the other creditors to suppose that he was bound by the composition. If his debt had been struck out, the proportional majority in favour of the resolutions would have been affected. He in effect told the other creditors that he had no security for his debt, and they voted on the supposition that the debtor would be able to pay the composition. If *Buckingham* is allowed to enforce his execution, the debtor may be unable to pay. No security can be acquired after the first meeting: *Ex parte Jones* (3). At any rate the injunction should be granted as to the £53.

Hilbery, for *Buckingham*, was not called upon.

Judgment.

JAMES, L.J.:—

5 C P D 357

A creditor can be bound by a composition against his will only by being brought within the terms of the Act, or by reason of some personal equity between himself and the other creditors. There are not only affirmative words in sect. 126, but there are negative words—the composition shall be binding "on all the creditors whose names and addresses, and the amount of the debts due to them, are shewn in the statement of the debtor, produced at the meetings at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors." The Respondent is a creditor who has throughout opposed the resolutions. Whether he ought to have been admitted to prove and vote was a matter for the determination of the meeting. He never intended to withdraw his opposition. He has consented to nothing, and he has not misled any one. He is not within the principle of *Campbell*

(1) Law Rep. 8 Ch. 682, 687. (2) 1 C. P. D. 267.
(3) Law Rep. 10 Ch. 663.

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v. *Im Thurn* (1). He did not vote for the resolutions, and neither by words nor by conduct has he led any one to believe that he assented to the composition. He stands upon his legal rights as they are defined by the Act, and there is no equity to deprive him of those rights. The appeal must be dismissed with costs.

BAGGALLAY and COTTON, L.JJ., concurred.

Solicitor for Appellant: *S. Mayhew.*
Solicitors for Respondent: *F. W. & H. Hilbery.*

C. A. 1877 *July* 10.

KEMP *v.* BIRD.

[1876 K. 37.]

Lease—Covenant not to let adjoining Property for purpose of a Trade—Covenant not running with Land.

7 Ch.D. 275
19 Ch.D. 263.
23 Ch.D. 87.

B. demised an eating-house for a term of twenty-one years, and covenanted that he would not during the term let any house in the same street for the purpose of carrying on the business of an eating-house, provided always that the covenant should be binding only on *B.*, and not on his heirs, executors, administrators, or assigns. Subsequently *B.* let the adjoining house for twenty-one years to another person, who covenanted with him not to carry on there any trade or business without *B.*'s license. The first lease was subsequently assigned to the Plaintiff, and the second to *G.* The Plaintiff then brought an action against *B.* and *G.* to restrain *G.* from carrying on the trade of an eating-house on the premises comprised in the second lease, and to restrain *B.* from permitting him to do so.

Held (affirming the decision of *Fry*, J.). that *B.*'s covenant was not broken by *G.*'s carrying on the business of an eating-house, and that the Plaintiff had no equity to restrain *G.* from doing so.

Statement.

THIS was an appeal from a decision of Mr. Justice *Fry* (2).

The action was brought to restrain the Defendant *Godfrey* from carrrying on, and the Defendant *Bird* from permitting him to carry on, at 33, *London Street, Paddington*, the trade or business of an eating-house, ale or beershop, or coffee-house.

The Plaintiff was the occupier of the adjoining house, 34, *London Street*, under a lease granted in 1870 by *Bird* to *Elizabeth*

(1) 1 C. P. D. 267. (2) *Ante*, p. 549.

Statement.

Fareweather, which contained a covenant by *Bird* that he would not demise any of the houses in the same street to any person or persons whomsoever for the purpose of carrying on the trade or business of an eating-house, ale or beershop, or coffee-house: provided always that the covenant lastly thereinbefore contained should be binding only on the said *G. Bird*, and not on his heirs, executors, administrators, or assigns.

The premises were assigned in 1875 to the Plaintiff. In 1872 the Defendant *Bird* demised No. 33, *London Street*, to *H. Sly* for a term of twenty-one years, and the lessee covenanted that he, his executors, administrators, and assigns, would not carry on upon the property any trade or business without the leave of the lessor. This lease was afterwards assigned to the Defendant *Godfrey*.

The Plaintiff alleged that *Godfrey* was carrying on the business of an eating-house at No. 33, and that both *Sly* and *Godfrey* had notice of the covenants contained in the lease under which the Plaintiff claimed; and he claimed an injunction against *Godfrey* and *Bird*, and damages against each of them.

Godfrey denied notice of the covenants in the Plaintiff's lease, and submitted that they did not bind him. He also denied that he was carrying on the trade in question.

The facts and the pleadings are more fully stated in the previous report.

Mr. Justice *Fry* dismissed the action with costs, and the Plaintiff appealed from that decision.

Argument.

Fischer, Q.C., and *Tremlett*, for the Appellant:—

The object of the parties in entering into the covenant in the Plaintiff's lease must be considered, namely, through the instrumentality of the covenant to restrain the carrying on of the trade. Therefore *Bird* commits a breach of his covenant with the Plaintiff when he refuses to enforce against *Sly* and his assignees the covenant which *Sly* made with him: *Jay* v. *Richardson* (1). Moreover, that covenant was made by *Sly* for the benefit of the owner of the neighbouring houses which are held under *Bird*, and *Bird*, therefore, is a trustee of that covenant for them, and is bound to

(1) 30 Beav. 563. 8 Jur. N.S. 689

C. A. 1877 KEMP v. BIRD. Argument.

enforce it for their benefit. In *Master* v. *Hansard* (1) Lord Justice *Bramwell* says: "It did indeed occur to me during the argument that if it could be shewn that the covenants entered into by the lessees of the *Crystal Palace Hotel* property were meant for the benefit of the owners of the adjoining property, and had been made known to the Plaintiff's assignor when he took his lease, or possibly even if they had not been so made known, it might have been said that the lessee of the second property was an equitable assignee of the benefit of those covenants."

Bristowe, Q.C., and *Stirling*, for *Bird*; and *Bagshawe*, Q.C., and *Bunting*, for *Godfrey*, were not called on.

Judgment, James, L.J.

JAMES, L.J.:—

I am of opinion that the judgment of the learned Judge in this case cannot be disturbed. Persons ought to look after their own interests in framing their own contracts and their own covenants. Persons who are men of business, as they were here, are able to get protection and advice, and they must make their covenants express, so as to state what they really mean, and they cannot get a Court of Law or of Equity to supply something which they have not stipulated for in order to get a benefit which is supposed to have been intended. Here the words are very plain, and the covenant is intelligible and reasonable as it stands (as Mr. Justice *Fry* has observed), whatever may be the extent or effect of it. It is, "That the said *G. Bird* shall not, during the said term, demise or let any or either of the messuages or tenements now forming the said street called *London Street, Paddington*, between *Arthur Mews* and *Francis Mews*, to any person whomsoever for the purpose of carrying on the trade or business of an eating-house," &c. He may not demise it or let it for that purpose. I assume that if he demised it or let it generally, so as to allow the tenant to do as he liked, that would introduce a different question; but that was not the case here. If it had been intended that there should have been a positive restriction on the use of the premises during the term, there is a well-known form which the parties might have used, and which would have been binding on the owner, and on

(1) 4 Ch. D. 718, 723.

his representatives, and on the assignee—that is, "That the said *G. Bird*, his heirs, executors, administrators, and assigns, shall not, during the said term, demise or let, or permit any of the said messuages or tenements to be demised or let," and so on. It is quite clear that *Bird* did not intend to enter into such a covenant. By what right are we to extend this covenant beyond the words in which it is expressed—that is, that he shall not demise or let? He has not demised or let. It is said that he has undertaken some trusteeship. There is no trusteeship between landlord and tenant that I am aware of, any more than there is between tenant and landlord. I cannot find anything here that makes *Bird* a trustee at the will and pleasure of *Kemp* to enforce anything against *Godfrey*. *Bird* has certainly not, in my opinion, violated his covenant; nor has he come under any obligation to *Kemp* to allow his name to be used. Therefore it appears to me that the judgment of the Court below was right and must be affirmed, and the appeal must be dismissed with costs.

BAGGALLAY, L.J.:—

I am of the same opinion. The Appellant contends that Mr. Justice *Fry* has acted on the strict construction of the covenant and of the other provisions contained in the lease, whereas he ought to have had more regard to what was the evident object and intention of the parties. I know of no possible way, where it is alleged that there have been breaches of contract, of finding out what was the intention of the parties, than by looking at what is found in the covenant itself. The Appellant is desirous to deduce from those terms something far beyond what the document itself puts forth, and if once we were to adopt that method in this Court we should introduce very great confusion into the construction of documents of this kind.

It was undoubtedly the intention of the parties to modify to some extent the stringency of the ordinary restricting covenant, and it is the extent to which it was to be modified which now becomes the question. Here we have not only no covenant to permit the Appellant to use the name of the lessor, but the usual words extending the covenant to his heirs, executors, administrators, and assigns, are left out. This would, I think, have

C. A. 1877 KEMP v. BIRD.

Judgment, Baggallay, L.J.

been quite enough to support the judgment of Mr. Justice *Fry*. But when we look at the covenant we find that it is expressly provided that it is to be binding on the lessor, but not on his heirs, executors, administrators, and assigns. It is clear that the obligation was to stop at the lessor, and was not to extend to his assignee or lessee. I am, therefore, of opinion that the judgment of Mr. Justice *Fry* must be affirmed.

Cotton, L.J.

COTTON, L.J.:—

I am of the same opinion. Of course we must construe instruments first to see what was the intention of the parties. The case has been put upon two grounds which are not, to my mind, consistent. It is said that there has been a breach on the part of *Bird* of his covenant that he would not let the house for the purpose of its being used as an eating-house, by reason of his not suing *Godfrey* in order to prevent his using the house for an eating-house. I think that what he has done is certainly not a breach of the covenant. Lord Justice *Bramwell*, in the case cited, *Master* v. *Hansard*, is referring to this sort of case when he says (1), "If the lessees had erected buildings, I take it the Plaintiff, in the absence of any covenant by his landlords to that effect, could not call on the landlords to enforce against the lessee their covenant not to build." I know of no authority for saying that under such circumstances as these a landlord is a trustee for his tenant in the sense that he must, at the request of the lessee, enforce a covenant against another lessee. I cannot see that it can be said with any fairness that there is a general covenant by *Bird* not to allow the house to be used for the purpose of an eating-house; and I think that the covenant with *Godfrey* was not a covenant entered into for the benefit of the Plaintiff, but was for the benefit of the landlord, to be enforced as he might think fit. In my opinion, therefore, the judgment must be affirmed.

Solicitors: *Eardley-Holt & Co.; Singleton & Tattershall; Bowker, Peake, Bird, & Collins.*

(1) 4 Ch. D. 723.

Ex parte COATES. *In re* SKELTON.

C. A.
1877
C. J. B.
June 11.
C. A.
July 12.

Bankruptcy Petition — Allegation of Act of Bankruptcy — Departing from Dwelling-house—"Intent to defeat or delay Creditors"—Formal Defect—Amendment—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 82—*Bankruptcy Rules*, 1870, *r.* 208.

A bankruptcy petition against a trader which alleges as an act of bankruptcy that he has departed from his dwelling-house or otherwise absented himself, must allege that he did so with intent to defeat or delay his creditors, otherwise the petition will be demurrable, and must be dismissed.

Such a defect is a matter of substance, not a merely formal defect, and it cannot be cured by amendment.

15 L.D. 21
W.N. 84 82.
25 L.D. 115

Statement.

THIS was an appeal from a decision of the Chief Judge in Bankruptcy.

On the 3rd of March, 1877, a bankruptcy petition was presented in the *Sunderland* County Court by *John Coates* against *William Skelton*, a grocer at *Sunderland*. The act of bankruptcy alleged in the petition was that *Skelton*, "being a trader has departed from his dwelling-house or otherwise absented himself," but there was no allegation that he had done this "with intent to defeat or delay his creditors." An order for substituted service of the petition on *Skelton* was made under rule 65, and, substituted service having been effected, *Skelton* was, on the 6th of March, adjudicated a bankrupt in his absence. On the 17th of March he gave notice of motion to discharge the order of adjudication, or that the petition might be reheard. The petitioning creditor, on the 22nd of March, gave notice of motion for an order to amend the petition by inserting in it the words "with intent to defeat or delay his creditors." On the hearing of these motions on the 29th of March, the Registrar, being of opinion, upon the evidence, "that *Skelton* had departed from his dwelling-house or otherwise absented himself with intent to defeat or delay his creditors, and that the omission of the latter words from the petition was a formal defect or irregularity by reason of which no substantial injustice had been caused," dismissed *Skelton's* motion. *Skelton* appealed to the Chief Judge. The appeal was heard on the 11th of June, 1877.

C. A. 1877 *Ex parte* COATES. *In re* SKELTON. Judgment, C. J. B.

Winslow, Q.C., and *E. C. Willis*, for the Appellant.

De Gex, Q.C., and *McClymont*, for the petitioning creditor.

BACON, C.J. :—

I can only deal with the words of the Act of Parliament; I cannot go beyond them. The Act says that, under certain circumstances, proceedings may be taken against the debtor for the purpose of adjudicating him a bankrupt. The law says that if a creditor will allege in his petition that the debtor, being a trader, has, with intent to defeat or delay his creditors, departed from his dwelling-house—if the creditor will allege that fact, and give evidence in support of it, then the debtor is liable to be adjudicated a bankrupt. That is the law, and I must follow it; and I have no right to go into other circumstances. It is the very gist and essence of the *Bankruptcy Act* that creditors who claim the benefit of these severe and almost criminal provisions of the law cannot have that benefit unless they strictly comply with the terms of the Act. The fact of the debtor having departed from his dwelling-house in itself announces nothing. He may have gone to bury his wife or his mother, or to a meet of foxhounds. But that which the law holds, and rightly holds, to be the important fact is, that he has departed "with intent to defeat or delay his creditors." If he does it with that intent it is an act of bankruptcy. That fact the creditor's petition in this case, through some unskilfulness on the part of the person drawing it, has not alleged. The creditor has neglected to conform to the law, and to present a petition in the terms required by the law so as to entitle himself to the relief for which he asks. That is plainly irregular. There is in the bankrupt law a certain savouring of criminality, and as in criminal proceedings no evidence of general moral delinquency on the part of the person charged can be admitted against him, so here the bankrupt may possibly be largely indebted, but I cannot go into the merits of the case. The matter has been brought before the Court in an imperfect manner. The only thing charged in the petition is that the debtor has gone away from his dwelling-house, and in my opinion the Petitioner

cannot be permitted to leave out the words "with intent to defeat or delay his creditors."

C. A. 1877 *Ex parte* COATES. *In re* SKELTON. Judgment, C. J. B.

Then it is said that under rule 208 (1) there can be an amendment. But, in my opinion, the petition, after an order for adjudication has been made upon it, is not a "proceeding" within the meaning of rule 208. No amendment of the petition can amend the affidavit upon which the adjudication has been made. That affidavit would still remain imperfect.

The Appellant's right is to call upon the Court for an order rescinding the adjudication, which ought not to have been made, and I will make that order, but only on condition that he brings no action against the petitioning creditor. The Appellant must have all the costs which he has sustained by reason of his having been improperly made a bankrupt.

From this decision the petitioning creditor appealed. The appeal was heard on the 12th of July.

C. A.

De Gex, Q.C., and *Hilbery*, for the Appellant:—

Argument.

If the petition is defective, the defect is merely formal. Therefore, by sect. 82, it does not invalidate the proceedings, for no substantial injustice has been caused to the debtor. Rule 65, which provides for the way in which the petition is to be served in such a case, omits the words "with intent to defeat or delay his creditors." The mere fact that the petition says that an act of bankruptcy has been committed implies that there was an intent to defeat or delay creditors, for otherwise departing from the dwelling-house would not be an act of bankruptcy. Under rule 65 the adjudication is always made in the first instance *ex parte*. After the adjudication this debtor appeared and shewed cause against it. The whole matter was then gone into, and the Judge

(1) Sect. 82: "No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to such proceeding is of opinion that substantial injustice has been caused by such defect or irregularity, and that such injustice cannot be remedied by any order of such Court."

Rule 208: "In any proceeding before the Court, the Court may allow any amendments which in the judgment of the Court or Registrar ought to be allowed on such terms as may be ordered."

C. A. 1877 *Ex parte* COATES. *In re* SKELTON.

of the County Court came to the conclusion that there was the intent. At any rate, an amendment of the petition should be allowed under the power given by rule 208.

Winslow, Q.C., and *E. C. Willis*, for the debtor, were not heard.

Judgment, C. A. James, L.J.

JAMES, L.J.:—

To allow this appeal would be an encouragement to slovenly procedure. The forms ought to be adhered to. This is really not a mere matter of form. The Act says you must tell the debtor what the act of bankruptcy is which you allege against him, so that he may have an opportunity of contesting it in the first instance. The appeal must be dismissed.

BAGGALLAY and COTTON, L.JJ., concurred.

Solicitors for Appellant: *Johnson & Weatherall*, agents for *Bowey & Brewis, Sunderland.*

Solicitors for Debtor: *Bell, Brodrick, & Gray*, agents for *M. Allison, Sunderland.*

C. A. 1877 *July* 14.

In re PEARSON (A LUNATIC).

Trustee Act, 1850, *s.* 3—*Appointment of new Trustee in place of Lunatic Trustee—Vesting Order in continuing and new Trustees—Order in Chancery Division and in Lunacy.*

Where one of several trustees is a lunatic and it is desired to appoint a new trustee in his place, the petition must be intituled in the Chancery Division as well as in Lunacy, otherwise the vesting order will sever the joint tenancy.

Statement.

THIS was a petition for a vesting order under the *Trustee Act*, 1850.

By two indentures of settlement dated respectively the 20th of July, 1855, and made in contemplation of the marriage of Mr. *John Jefferies* and his wife, certain real estates, and also certain shares of railway stock and other personal property, were vested in *T. P. Cobb, J. M. Pearson*, and *Frederick Pearson*, upon the trusts therein

declared. And each of the indentures contained a power to Mr. and Mrs. *Jefferies* and the survivor of them to appoint a new trustee in the place of any trustee who should die or become incapable or unfit to act.

In August, 1876, *Frederick Pearson*, one of the trustees, was found to be of unsound mind, and by an indenture dated the 24th of February, 1877, Mr. *Jefferies*, who had survived his wife, appointed *G. Greenwood Pearson* a trustee in his place.

Statement.

A petition was now presented in Lunacy by Mr. *Jefferies* and his children, the continuing and the new trustee, and the committee of the lunatic, praying for an order that the real estate comprised in the settlement might vest in the said *T. P. Cobb*, *J. M. Pearson*, and *G. Greenwood Pearson*, their heirs and assigns, upon the trusts of the said settlement, and also that the right to recover and call for a transfer of the personal property might vest in the same trustees.

Fellows, for the Petitioners.

JAMES, L.J.:—

Judgment.

You may take the order, but the petition must first be amended by intituling it in the Chancery Division as well as in Lunacy. For if the order is made in Lunacy only, it will not affect the title of the two continuing trustees and will sever the joint tenancy. The order must also formally reappoint the new trustee.

BAGGALLAY, L.J., concurred.

The petition was accordingly amended by intituling it in the Chancery Division as well as in Lunacy, and asking for the reappointment by the Court of *G. Greenwood Pearson* as a trustee.

Solicitors: *Janson, Cobb, & Pearson.*

V.-C. H.

1877

March 12, 13.

RALPH *v.* CARRICK.

[1870 R. 157.]

Will—Conversion—Whether out and out—Bequest after Death of Wife—Life Estate by Implication—Descendants—Parent's Share—Word "Payable"—Thellusson Act (39 & 40 *Geo.* 3, *c.* 98)*—Void Accumulation—Intestacy—Costs.*

10 Ch D 470

A testator, who died in June, 1837, gave to trustees the whole of his property in trust for the payment of his debts, with full power to sell all or any part of his estates or to demise the same; and directed them out of the moneys produced or out of the rents to pay the testamentary expenses and debts, and then gave certain legacies, and directed that after the death of his wife and after the payment of all debts and legacies the whole residue of all his remaining property should be divided into twelve portions, and be given "to the children" of his late aunts "equally among them, the descendants, if any, of those who might have died being entitled to the benefit which their deceased parent would have received had he or she been then alive . . . . and should there be no children or lawful descendants of any of his aunts remaining at the time the bequests should become payable, then the portions" were to fall into the residuary fund. The testator declared that it should not be incumbent on his executors to pay the legacies sooner than two years after his decease; nor to divide the residue amongst his relatives until two years after the death of his wife, and made provision for payment of his wife's jointure. The wife died in 1876:—

Held, that the children and grandchildren of the aunts only were entitled to the benefit of the gift; and that the wife did not take an estate for life by implication.

(Reversed by Ch. App. 11 Ch D. 273.

Statement.

ANDREW CARRICK, M.D., who died in June, 1837, by his will, dated in March, 1837, gave to his executors thereinafter named (three in number), their heirs, executors, administrators, and assigns, the whole of his property, real and personal, in trust for the payment of his just debts; with full power to sell absolutely and convert into money all or any part, or as much as they should at any time think fit and necessary, of his estates real and personal (but subject as to his personal property to certain specific directions), or to demise or let all or any of his hereditaments; and after providing for the appointment of new trustees to act in the execution of the trusts of the will, he directed that they should stand possessed of the moneys produced, upon trust out of those to arise from his real estate only, or out of the rents and

profits (and not out of the produce of his personalty) to pay all costs, charges, and expenses which they should be put to in or about the performance of the trusts, all his mortgage and other debts, and funeral charges and the legacies and bequests. After giving some legacies, he gave to his wife £1500, and all his household furniture and other articles mentioned. He then gave various other pecuniary legacies, including certain legacies to charitable institutions (which he directed to be paid out of his personal estate), and after referring to a marriage settlement, and making provision for payment under certain circumstances of other legacies out of the produce of his real estate, directed that in the event of his death without lawful issue (which event happened), and after the death of his wife (which event happened in 1876), and after the payment of all debts, legacies, and bequests, the whole residue of all his remaining property, real and personal, in *England* should, by his executors, trustees, or administrators, be divided into twelve equal portions, whereof three portions should be given to the children of his late aunt, Mrs. *Wingate*, equally among them, the descendants (if any) of those who might have died being entitled to the benefit which their deceased parent would have received had he or she been then alive; that two portions should in like manner be given to the children and descendants of his late aunt Mrs. *Bannerman;* two portions should in like manner be given to the children and descendants of his late aunt Mrs. *Monteath;* one portion to the children and descendants of his late aunt Mrs. *Cunningham;* one portion to the children and descendants of his late aunt Mrs. *Matthie;* one portion to the children and descendants of his late aunt Mrs. *Elder;* one portion to the children and descendants of his late aunt Mrs. *Finlayson;* and that the remaining twelfth portion should be given to the children or descendants of his late maternal aunt Mrs. *Pearson;* and should there be no children or lawful descendants of any of his aunts above named remaining at the time these bequests should become payable, then the portions of his residuary estate thereby devised and destined for such of them, should be placed in the general residuary fund, and bestowed as part thereof as above pointed out. The testator then proceeded thus: "And seeing that a large portion of my real estate must be sold immediately after my decease for the

V.-C. H. 1877 RALPH v. CARRICK. Statement.

payment of my just debts and the expenses necessary in proving this my will and in carrying the provisions thereof into effect, and that great loss of property will unavoidably accrue from the hasty conversion of land into money in these times of great and undue depression, through that most unjust, impolitic, and swindling measure of restoring, as it is called, the current medium; or rather, as it should be called, a measure to compel debtors to pay their creditors double the amount that was due: in order, therefore, to mitigate in some degree this dreadful mischief by giving longer time for making the necessary arrangements, I hereby declare that it shall not be incumbent on my executors, trustees, or administrators to pay any of the legacies mentioned in this my will sooner than two years after my decease, neither shall the division of my residuary property amongst my relatives as above stated be made until two years after the death of my beloved wife *Caroline*, nor until all the other legacies and bequests in this my will, or which I may hereafter make by any codicil thereto, shall have been duly paid and discharged or provided for." The testator directed that the surplus of the moneys arising from the sale of his real estate after payment of his just debts should be placed in the funds, or on mortgage of adequate value, to provide for his wife's annuity of £700 payable to her under their marriage settlement. The testator died seised and possessed of considerable real and personal estate.

The testator's aunts (above named and referred to) left children, but all such children had long since died, and many of such children had left descendants.

The Plaintiff was a great grandson of Mrs. *Monteath*, one of the aunts, and claimed to be entitled as a descendant. His grandparent died in 1830; and his parent died in 1867.

The descendants of the aunts were very numerous, and many of them were residing out of the jurisdiction of the Court.

The bill was filed on the 15th of November, 1870, for the administration of the estate. The widow having died, and the Chief Clerk having made his certificate shewing that the co-heirs were certain children of the seven aunts, and that the next of kin were certain children of the aunts, the cause now came on to be heard upon further consideration and upon a petition.

Eddis, Q.C., and *Edward Ford*, for the Plaintiff, after stating the facts, said:—

The question is whether the principle in *Sibley* v. *Perry* (1) applies to this case, and it is submitted that it does not. The word "descendants" being *nomen generalissimum*, like issue, will include the Plaintiff and the other great grandchildren. There is nothing in this will to affect the ordinary and general meaning of that word. In *Sibley* v. *Perry* there was a gift to persons named, if living at the testator's death, but if they should be dead, then he willed that the lawful issue of those dying before him should take the share which their respective parents would have enjoyed, and it was held that though the word "issue" would comprehend all "descendants," yet there it must be confined to children. The rule applied to that case was, that where there is a gift to "issue," with a direction that the issue shall take a deceased parent's share, the word "issue" in relation to "parent" means the children of that parent; but there is nothing here to indicate that "parent" was meant to be any particular parent in the series of parents. If the words "descendants and parent" stood alone the case would be the same as "issue and parent," but here the word "children" was used, and the gift was to them and to the "descendants" of those who might be dead, they taking their parents' share. This shews that the testator had something more than "children" in his mind. In *Sibley* v. *Perry* it was not decided that parents could take concurrently with their children. There is no case where the decision in that case has been applied to descendants. Grandchildren and great-grandchildren will not, it is submitted, take together, but in the place of their parents *per stirpes*. The word "descendants" means those in any line of generation who may happen to be in existence at the death of the widow. They will not take concurrently with their parents, but the successive generations from parents not alive will take *per stirpes*: *Robinson* v. *Sykes* (2). This case falls within the decision in *Ross* v. *Ross* (3), and a more confined rule of construction than was applied in that case would have the effect of causing an intestacy, which the Court always struggles against.

(1) 7 Ves. 522.

(2) 23 Beav. 40.

(3) 20 Beav. 645.

2 Jur. N.S. 895

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[They also referred to *Gibson* v. *Fisher* (1).]

[HALL, V.C. referred to *Rowland* v. *Gorsuch* (2).]

Mackeson, Q.C., and *W. W. Karslake*, for great grandchildren of Mrs. *Pearson*—the intermediate generations having died—in the same interest, submitted that it would be a very narrow construction of the language of this will if it were held that these descendants were omitted from the benefit of the bequest. The primary meaning of the word "descendants" was not confined to "children," but included any descendants. It was clear that the testator intended that if at the death of the tenant for life any descendants remained, they should take a portion of his residuary estate.

Bristowe, Q.C., and *G. I. Foster Cooke*, for the trustees of the will.

Dickinson, Q.C., and *H. A. Giffard*, for the grandchildren of Mrs. *Wingate*, referred to the fact that they were interested in three-twelfths of the residue, and submitted that the intention of the testator was, that if the children of an aunt were alive they should be entitled to take shares in her portion of the residue; but the testator supposed that one or more might not be alive, and therefore not take any benefit, and in that event he made a substitutionary gift, *i.e.*, he intended that if any of the children should be dead their children should take their parents' share. There is no reference to more than one class of parents. The decision in *Ross* v. *Ross* (3) is not so applicable to this case as those in *Sibley* v. *Perry* (4) and *Pruen* v. *Osborne* (5), and it is submitted that the principle in *Sibley* v. *Perry* ought not to be departed from, unless it can be shewn that this case is a clear exception to the general rule there laid down. [They also referred to *Theobald* on Wills (6).]

Boome, for another legal personal representative in the same interest.

(1) Law Rep. 5 Eq. 51.
(2) 2 Cox, 187.
(3) 20 Beav. 645.
(4) 7 Ves. 522.
(5) 11 Sim. 132.
(6) Page 155.

Eddis, in reply.

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HALL, V.C.:—

I am of opinion that in this will the word "descendants" must receive the same construction as the word "issue," and for the purpose of determining this question the will must be read as if the word "issue" had been in it instead of the word "descendants." The question is, whether the case of *Sibley* v. *Perry* (1) applies to this case or not. It has been contended on behalf of the grandchildren of Mrs. *Wingate* that it does not, because of the case of *Ross* v. *Ross* (2), which was decided in 1855, but that case was one of a special character, and must be considered as resting mainly, if not entirely, upon its own circumstances. The gift there was to the children of *Christian Ross* who should be living at the time of her decease, and "of the issue if any then living," the issue, if more than one, to take equally the part or share which their parent would have been entitled to if he or she had survived the said *Christian Ross*, "and if but one, then to take a child's share." That is to say, that although there was first mentioned the part or share of the parent, yet what was given and intended to be given in fact was not a share to be ascertained simply with reference to the parent, but with reference to the child. The child's share was to go over, and that might well go over to remoter descendants than to the children of that child. The Master of the Rolls, in his judgment (3), laid considerable stress upon those words "a child's share," and said that the word "issue" was confined to the children of the parent, but that the word "parent" there did not mean the children of *Christian Ross*, but might mean a grandchild.

I must consider that that is a special and exceptional case, depending substantially on the interpretation given to the word "parent" and the use of the word "child," and is not the ordinary case of a gift of a parent's share. In the present case that does not occur, because the gift is, taking the case of Mrs. *Wingate*, "to the children of my late aunt . . . . equally among them, the descendants, if any, of those who may have died being entitled to the

(1) 7 Ves. 522. (2) 20 Beav. 645.
(3) 20 Beav. 650, 653.

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benefit which their deceased parent would have received had he or she been alive." That is the share of the parent. The gifts being clearly of the parent's share, it does not appear to me that the case is to be determined upon the fact of the descendants being included in the original gift, although, no doubt, that is a circumstance, because in some of these cases the issue have been included in the original gift, and that does not create the distinction; and after the case of *Martin* v. *Holgate* (1) it would be difficult to say that this is not a gift to the descendants in the original gift; but whether that would be so or not it appears to me immaterial for the present purpose.

I will now refer to the other authorities. As to *Robinson* v. *Sykes* (2), looking at the will in that case, it seems to me that the gift was so expressed as not to come within the influence of *Sibley* v. *Perry* (3), because the trust there was for the parents and then for the children; but if any child should die in the lifetime of the husband and wife leaving issue then living, his share should go equally between the issue of such child when and at such time as the respective shares of such child would have become due and payable. The question did not arise in that case. It is true the Master of the Rolls, in his judgment, referred to *Ross* v. *Ross* (4), but not in a way to throw any light upon the present discussion. He referred to that case as shewing that where issue are included in the word "children," they all take *per stirpes*, and that parents and children do not take collectively together, in a case where you find that they in substance are only taking by way of substitution for their deceased parents.

I have looked at several other authorities. In *Smith* v. *Horsfall* (5) there was a trust for the five cousins who should be living at the time of his (the testator's) decease, and to the issue of such of them as should be then dead leaving issue, share and share alike, such issue respectively nevertheless taking between them a parent's share only, and it was held that the word "issue" was to be construed "children," and that grandchildren were excluded. The Master of the Rolls recognised the general rule,

(1) Law Rep. 1 H. L. 175.
(2) 23 Beav. 40.
(3) 7 Ves. 522.
(4) 20 Beav. 645.
(5) 25 Beav. 628.

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and referred to *Ross* v. *Ross* (1), and said that in that case a different question arose.

In *Rhodes* v. *Rhodes* (2) the trust was for the issue. I only refer to that case for this reason, that the trust was for the testator's children, or such as his wife should appoint, and if she should make no disposition, then equally amongst his children and the lawful issue of such as should be dead, the issue to take no greater share than their deceased parent. And the Master of the Rolls was of opinion that "issue" meant "children," and said there were many cases where the word "issue" was so restricted.

In *Stevenson* v. *Abingdon* (3) the Master of the Rolls had to construe a bequest to cousins with a substituted gift to the issue of any dying in the testator's life, the issue to take their parents' shares, and the Master of the Rolls said he was of opinion that according to the established rule the word "issue" was to be confined to children where there was a reference to their parents' share, and that he must exclude all issue that were not children of the cousins. It appears to me, therefore, that the Master of the Rolls did not mean at all to question the general rule. He considered that those who ask the Court to depart from it have to make out a special case. I consider that he did depart from it in *Ross* v. *Ross*, but I must apply the general rule to the case now before me, and the consequence will be that the class to take must be confined to the children of children, that is to say, grandchildren. I hold that the grandchildren took as joint tenants, and therefore the representative of a deceased grandchild would be excluded because of the joint tenancy.

A further question arose as to whether the widow was entitled to a life interest in the income by implication.

Argument.

W. Pearson, Q.C., and *Byrne*, for the legal personal representatives of the widow:—

Every gift by this will was subject to the wife's life interest. There is a declaration in the will that it should not be incumbent on the executors to pay any of the legacies sooner than two years

(1) 20 Beav. 645. (2) 27 Beav. 413.
(3) 31 Beav. 305.

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after her decease; nor divide the residue amongst his relatives before that time. The widow, it is submitted, was entitled for her life to the whole of the income of the real and personal estate. The question here is one of intention, and that is manifested by the language of the will. It was intended that the residuary legatees should take only after the death of the widow. That intention is clearly demonstrated. Where there is a devise to the heir after the death of *A.*, that is an implied gift of a life estate to *A.* The children of the aunts alive at the testator's death would be the co-heirs-at-law and next of kin, and form the class to whom the gift was made after the death of the widow, and that and the other parts of the will are sufficient to enable the Court to imply the gift of a life estate to her. Assuming that some of the children died in their parents' lifetime, the children of those children would take by way of substitution, and in the place of their parents. Mrs. *Wingate's* children, for instance, were some of the co-heirs. If all had died their issue (if one or more) would have been co-heirs, and would take under the residuary gift. The number of persons to take under that gift might be increased, still the heirs would be in the class. But the simple question is, can it be seen whether, under the circumstances in which the gift was made, there is a sufficient manifestation of intention that a person should take a life interest before the corpus became distributable. The authorities clearly shew that the widow was entitled.

[They referred to *Cockshott* v. *Cockshott* (1); *Hutton* v. *Simpson* (2); *Rex* v. *Inhabitants of Ringstead* (3); *Ramsden* v. *Hassard* (4); *Bird* v. *Hunsdon* (5); *Blackwell* v. *Bull* (6); *Humphreys* v. *Humphreys* (7); *Cock* v. *Cock* (8); *Stevens* v. *Hale* (9); *Jarman* on Wills (10); *Holland* v. *Woods* (11); *In re Blake's Trust* (12); *In re Smith's Trusts* (13); *Davies* v. *Hopkins* (14); *Theobald* on Wills (15).]

(1) 2 Coll. 432.
(2) 2 Vern. 723.
(3) 9 B. & C. 218, 288.
(4) 3 Bro. C. C. 236.
(5) 2 Sw. 342.
(6) 1 Keen, 176.
(7) Law Rep. 4 Eq. 475.
(8) 21 W. R. 807. W.N. (1873) 131
(9) 2 Dr. & Sm. 22.
(10) Page 499.
(11) Law Rep. 11 Eq. 91.
(12) Ibid. 3 Eq. 799.
(13) Ibid. 1 Eq. 79.
(14) 2 Beav. 276.
(15) Page 414.

Mackeson, Q.C., and *W. W. Karslake*, for some of the family of Mrs. *Monteath*:—

There is no gift whatever of the rents and profits. The testator made a provision for his wife for her life. The broad principle to be gathered from the cases is, that where there is a gift of residuary personalty at a future time, that gift carries with it the intermediate rents and profits, and they form part of the capital; and where there is a gift of a blended fund of real and personal estate, as an entirety, at a future period, on the death of a specified individual, to such persons as shall answer a particular description at that time, the intermediate rents and profits pass with the capital to those persons, *i.e.*, the rents and profits follow the corpus as accessories. The testator told the trustees what they were to do in the interval before his wife's death, and it cannot, it is submitted, be successfully contended that there is an implied gift of a life interest to his wife.

[They referred to *FitzHenry* v. *Bonner* (1), *Hodgson* v. *Earl of Bective* (2), *Pursell* v. *Elder* (3), *Generey* v. *Fitzgerald* (4), and *Smith* v. *Lomas* (5).]

Dickinson, Q.C., and *H. A. Giffard*, for the legal personal representative of one of the co-heirs:—

The claim now made on behalf of the widow is not warranted by authority or principle to be gathered from any case. In addition to claiming the benefit of the arguments against the contention on her behalf, it is submitted that it is not necessary to go so far back as *Generey* v. *Fitzgerald*; but there is sufficient in this will to exclude all idea of the widow being entitled to a life interest.

[They referred to *Aspinall* v. *Petvin* (6), *Hutton* v. *Simpson* (7), *Rex* v. *Inhabitants of Ringstead* (8), *Hodgson* v. *Earl of Bective* (9), and *Andrew* v. *Andrew* (10).]

(1) 2 Drew. 36.
(2) 1 H. & M. 376, 393, 397.
(3) 13 L. T. (N.S.) 203.
(4) Jac. 468.
(5) 10 Jur. (N.S.) 742.
(6) 1 S. & S. 544.
(7) 2 Vern. 722.
(8) 9 B. & C. 218.
(9) 10 H. L. C. 656.
(10) 1 Ch. D. 410.

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H. Walters Horne, for some of Mrs. *Matthie's* family, submitted that the intention was to create an accumulation after providing for the payment of debts, &c., and on that ground there was no necessary implication arising in favour of the widow taking a life estate.

Bristowe, Q.C., and *G. I. Foster Cooke*, for great grandchildren of Mrs. *Elder*, also contended that there was no gift by implication of a life estate to the widow, and they referred to *Martin* v. *Holgate* (1); *Lanphier* v. *Buck* (2); *Ackers* v. *Phipps* (3); *Jarman* on Wills (4); *Hawkins* on Wills (5).

W. Pearson, in reply:—

I submit that the claim of the widow is founded both on authority and principle. There is no gift of the income during her life. Suppose a testator devised a real estate, and made a bequest of personalty to his heir-at-law and next of kin, or suppose he said that on the death of his wife he gave all the residue of his real and personal estate to his son, could it be contended that the widow did not take a life interest by implication? There is no direction to accumulate. If the widow was entitled, there could be no accumulation. If the widow did not take a life interest by implication, then I admit the income would follow the corpus for twenty-one years, and that between that period and the widow's death it would not follow the corpus as an increment, but go according to the provisions of the *Thellusson Act* (39 & 40 Geo. 3, c. 98) to the co-heirs-at-law and next of kin.

Judgment.

HALL, V.C:—

Two or three questions have been argued very elaborately and ably as to the true construction of this will. The first question is, whether the widow took a life interest by implication? and the argument addressed to me on behalf of her representatives was, that in order to give an estate for life by implication it

(1) Law Rep. 1 H. L. 175.
(2) 2 Dr. & Sm. 484.
(3) 3 Cl. & F. 665.
(4) Vol. i. pp. 505, 616, 619.
(5) Page 179.

suffices that some one of the persons to whom the property was given after the decease of the person named in the will should be the heir-at-law or next of kin;—the fact that such person was the heir-at-law being the material circumstance as regards the real estate, and that he was the next of kin being the material circumstance as regards the personal estate. Several cases have been referred to, in which it has been held that there was a life estate by implication, the gift over being such that the heir-at-law was included among the persons to whom the gift was made after the death of the person named. But some of those cases can hardly be considered as authorities in favour of the general proposition; and, in fact, they may be said to go the other way, as they were decisions on very special grounds. The earliest case, that of *Bird* v. *Hunsdon* (1), is certainly an authority in favour of a life estate by implication; still there was a circumstance in that case which it is not unimportant to bear in mind, viz., that there was a trust of the income for maintenance of the person named, and a gift over after her death. That is a case, looking at the observations in the judgment, which cannot be taken as an authority establishing the general proposition that the fact of the heir, or co-heirs, or next of kin being included in a class is sufficient in itself to create an estate by implication. The case of *Aspinall* v. *Petvin* (2) was also very special in its character. It was the case of a son dying without issue in the testator's wife's life, and it was held that she was not entitled for life; and, so far as it goes, it is against the widow taking an estate by implication. The next case, that of *Blackwell* v. *Bull* (3), involved several points, and it was not considered as deciding the general question. In several of these cases the interest of the widow was more or less connected with the carrying on of a business and supporting a family, which seems to have been a sort of indication as to how the property was to be enjoyed during her life. The case of *Cockshott* v. *Cockshott* (4) was one in which there was, upon the whole will, a clear manifestation that the testator was looking to and considering the fact that the mother would be the person carrying on a particular business, and would be the head of the

(1) 2 Sw. 342.
(2) 1 S. & S. 544.
(3) 1 Keen, 176.
(4) 2 Coll. 432.

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family and receive the income for the purposes of the family generally. The circumstances of that case were special and peculiar, and not applicable to the present. In *Humphreys* v. *Humphreys* (1) it was held that the widow took a life estate by implication, and, probably, that is the strongest authority for the general proposition. The Vice-Chancellor there mentioned many of the cases which have been referred to, and among them *Stevens* v. *Hale* (2), which he said was decided on the special facts, and not on the principle involved.

Having regard to the terms of the clause in the will providing for descendants as distinct from children, although it may be according to the facts that out of so large a class there may be one or two persons who would answer the description of next of kin or heirs-at-law at the time when the will was made; yet, notwithstanding that, it appears to me to be a most important and material circumstance in considering whether it was intended or not that there should be a life estate by implication, that the persons to take ultimately under the particular description were, to a very great extent, persons who were unascertained at the dates of the will and death of the testator.

The testator gave the whole of his real and personal estates to trustees, creating a trust for the payment of his debts, and giving power to sell and convert his property—all or part of it—into money. No doubt the clause is a little ambiguous as to whether it amounted to a conversion of the whole of the property into money; but the words "or as much as they shall at any time think fit and necessary" seem to me to mean that they might at a particular time think it desirable to sell only a portion, but that is not inconsistent with the provision in reference to the ultimate realization of the whole. We must look at the other parts of the will to see whether that is so or not. I mention that, not that it is necessarily conclusive, though it might be said to have a material bearing; but if it has any at all, it is not unfavourable to the view that there is no implication of a life estate.

[After referring to the circumstance that the moneys to arise from the sale or sales, or the rents and profits of the property, were made applicable to paying the sums in the will mentioned—

(1) Law Rep. 4 Eq. 475. (2) 2 Dr. & Sm. 22.

the costs, charges, debts, legacies, and bequests; to the direction to pay certain particular and specific legacies; the other small provisions; the gift to the wife of £1500, and the household furniture, and the provision in reference to the first marriage, his Lordship then read the gift of the residue, and continued:—] It is a disposition by the testator of all the residue, which consisted of real and personal estate existing at his death, as well as of the rents and profits which subsequently accrued from the real estate, and therefore it is not merely a gift of a particular corpus, but of the residue of a fund consisting in part of rents and profits. Then there is a clause by which the testator declared it should not be incumbent to pay the legacies sooner than two years after his decease. The testator contemplated that possibly the legacies, which were to be paid partly out of rents and profits and partly out of the corpus, might not have been paid, but would remain unpaid, at the death of his wife. That is not favourable to the wife taking a life estate. The testator directed that the surplus of the moneys arising from the sale or produce of his real property, after payment of debts, should be invested to make good the annuity to his wife. That was done on the footing that the whole would be converted into money. That enables me to say that, although it is in terms a mere power to sell, yet when I find that the provision was to sell all or any part, or so much as they should think fit, I think the whole was intended to be converted into money, and kept together for the purpose of paying the annuity to his wife for life. If he meant to give his wife the income after paying her the annuity he would have added, "I mean her to have the £700, and to take anything beyond if there should be anything." Taking the will as a whole, and bearing in mind, as I consider it important to do, who the class are who are to take, and the provisions for payment of debts and legacies, and looking at the period of two years which was given for payment, and having regard to all the particular circumstances of the case, I have come to the conclusion that it was not the intention of the testator that the wife during her life should be entitled to the whole income of the residuary estate. It follows that the whole income goes along with the capital of the fund, subject only to this: that the accumulation must stop,

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under the provisions of the *Thellusson Act* (39 & 40 Geo. 3, c. 98), at the end of twenty-one years from the testator's death, and from that time the income must be separated, and it must be ascertained how much arose from the realty, and how much from personalty, and each of those funds will belong and be payable accordingly to the persons whom I may describe as the real and personal representatives of the testator, or those who claim through them respectively.

I hold that the residuary estate became divisible at the death of the widow, instead of at the end of two years from her death; that the period of void accumulation ceased at the death of the widow; that the persons claiming under the intestacy take those accumulations clear of all the costs of the suit, which must come out of the general fund, in accordance with the decisions in *Eyre* v. *Marsden* (1), *Addie* v. *Brown* (2), *Harloe* v. *Harloe* (3), *Alsop* v. *Bell* (4), and *Miles* v. *Harrison* (5).

Solicitors: *Patrick; Clarke, Woodcock, & Ryland*, agents for *Isaac Cooke & Sons, Bristol; Walter, Moojen, & Son; Nelson, Son, & Hastings; Phelps, Sidgwick, & Biddle.*

(1) 4 My. & Cr. 231.
(2) 4 De G. & J. 179, 198.
(3) Law Rep. 20 Eq. 471.
(4) 24 Beav. 451, 467.
(5) Law Rep. 9 Ch. 316.

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ADMINISTRATION—*Conversion—Gift of Residue to Wife for Life—Long Annuities.*] Testator gave the residue of his estate, real and personal, to trustees to pay to his wife the rents, issues, and profits for life for her own absolute use and benefit, and after making bequests of leaseholds, but not directing conversion, and of moneys, he gave the residue of his estate to five persons named equally. He authorized and empowered his trustees to allow the moneys which he possessed to remain in the same state of investment in which they should find them at his decease, unless circumstances should render it advisable to dispose of his bank shares. The testator's estate consisted, *inter alia*, of a sum of Long Annuities:—*Held*, that the widow was not entitled to enjoy the annuities in specie, but that they must be treated as having been converted at the death of the testator.—Order as in *Brown* v. *Gellatly* (Law Rep. 2 Ch. 751). PORTER *v.* BADDELEY - - - - 542

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2. —— *Delay in Conversion—Discretion of Executor.*] A testator bequeathed his personal estate to his executors upon trust to divide it equally among four persons, all of whom were of age. A considerable part of the estate consisted of three foreign railway bonds of very uncertain value. At the time of the testator's death they were worth about £150 each, but their value was declining rapidly, and at the end of a twelvemonth they were worth about £54 each. One of the legatees during the year repeatedly pressed the executors to sell, but the others did not join in doing so, and the executors thought it best to wait for the chance of a rise. Ultimately, fifteen months after the death, they sold two of the bonds for £54 each. The third, which remained unsold, had fallen far below that value:—*Held* (affirming the decision of *Hall*, V.C.), that as the executors had acted in the honest exercise of their discretion as to the time of selling property of a very uncertain and speculative character they ought not to be made personally responsible for the loss arising from their not having sold within the twelvemonth.—*Buxton* v. *Buxton* (1 My. & Cr. 80) approved and followed. MARSDEN *v.* KENT - - 598

3. —— *Gift of Share, subject to Deduction for Advances—Interest on Advances to be computed from Death of Testator.*] Testator, after bequeathing a share of mixed residue to one of his sons, stated that he had advanced sums amounting to £2550 to the son, and directed his trustees and executors to deduct the said sum of £2550 from the share so bequeathed:—*Held*, that the son was chargeable with interest at £4 per cent. on the £2550 from the death of the testator, and not merely from the end of a year after the death. FIELD *v.* SEWARD - - - 538

4. —— *Order of Probate Division charging*

ADMINISTRATION —*continued.*

Assets—Costs of Suit—Priority.] After an order had been made in the Chancery Division for the administration of the estate of a testator, an order was made in the Probate Division that the costs of the Plaintiffs in a suit there should be paid out of the estate "and have priority over all other claims on the estate":—*Held*, by the Court of Appeal (affirming the decision of *Malins*, V.C.), that these costs were to be postponed to the costs of administration in the Chancery Division. *In re* Mayhew. Rowles *v.* Mayhew - - 596

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—— Equitable—Consignments of bonds - 786
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BANKER—Death of partner—New firm—Novation - - - - - 255
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BANKRUPTCY—*Bill of Sale—Agreement for Bill of Sale—Bankruptcy Act*, 1869, *s.* 15 (5)—*Bills of Sale Act* (17 & 18 *Vict. c.* 36), *s.* 7—*Order and Disposition—Apparent Possession—Receiver.*] In an action to enforce an agreement by *B.*, an innkeeper, to give a bill of sale of his furniture and effects, *A.* obtained the appointment of a receiver, who entered into possession on the 16th of March, 1876, and served the customers. During the night *B.* absconded, and next day (the 17th of March) filed a liquidation petition, under which a receiver was appointed in bankruptcy. The two receivers remained in joint possession:—*Held*, that the case did not fall within the provisions of the *Bills of Sale Act*, 1854, and that the possession of *A.'s* receiver had taken the goods out of the order and disposition of *B.* at the time of his bankruptcy; and accordingly that the title of *A.* prevailed over that of *B.'s* trustee in bankruptcy. Taylor *v.* Eckersley - - - 740

2. —— *Bill of Sale—Unregistered Bill of Sale—Possession taken by Grantee before Filing of Liquidation Petition by Grantor—Prior secret Act of Bankruptcy—Relation back of Trustee's Title—Protected Transaction—Leave to appeal to House of Lords—Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36), *s.* 1—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 11, 71, 94, 95, 125.] In the 1st section of the *Bills of Sale Act*, 1854, the "time of such bankruptcy" means the time of the act of bankruptcy.—The grantee, under an unregistered bill of sale, took possession of the property comprised in it before the filing of a liquidation petition by the grantor. The day before possession was taken the grantor had committed an act of bankruptcy of which the grantee had no notice:—*Held*, that the title of the grantee was defeated by virtue of the relation back of the title of the trustee in the liquidation to the earlier act of bankruptcy.—The protecting clauses of the *Bankruptcy Act*, 1869, ss. 94 and 95, have no operation as regards a transaction which is made void by the *Bills of Sale Act*.—Leave to appeal to the House of Lords refused.—The prin-

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ciples upon which the Court acts in granting or refusing leave to appeal to the House of Lords explained. *Ex parte* Attwater. *In re* Turner [27

3. —— *Bill of Sale—Unregistered Bill of Sale—Bankruptcy of Grantor—Possession—Attempt to take Possession before Default by Grantor—Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36), *ss.* 1, 7.] Actual possession taken by the grantee of an unregistered bill of sale, even though taken wrongfully, may exclude the operation of the *Bills of Sale Act*.—But, though when possession is taken rightfully the possession will be extended by construction of law beyond the actual physical possession, this will not be done in the case of a wrong-doer. His possession will not be constructively extended beyond his actual physical possession.—*Furber* v. *Finlayson* (24 W. R. 370) questioned. *Ex parte* Fletcher. *In re* Henley [809

4. —— *Composition — Dissentient Creditor — Debt not properly inserted in Debtor's Statement of Affairs — Enforcing Judgment against Debtor—Effect of attending Meeting, proving Debt, and opposing Registration of Resolutions—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 126—*Bankruptcy Rules*, 1870, *rr.* 273, 284.] On the 24th of April, *B.*, the Plaintiff in an action, recovered judgment for £53 and costs. On the 25th of April the Defendant filed a liquidation petition. In his statement of affairs he inserted *B.* as a creditor for the £53, but made no mention of the costs. The first meeting of the creditors was held on the 19th of May. *B.* attended and proved a debt of £203, being the £53, and £150, the estimated amount of the costs. The meeting was adjourned to the 29th of May, when the creditors resolved to accept a composition, *B.* voting in the minority. On the 8th of June the costs of the action were taxed at £147. On the 9th of June *B.* gave notice to the debtor that he withdrew his proof, and the same day he issued execution against the debtor for the judgment debt and costs. On the 11th of June the second meeting of the creditors was held, and *B.* then gave written notice that he withdrew his proof, without prejudice to again proving on a subsequent occasion. The chairman refused to take the proof off the file. The composition resolutions were confirmed. *B.* took objections to the resolutions, and opposed their registration, but the registration was made:—*Held*, that, by reason of the insufficient statements of *B.*'s debt in the debtor's statement, *B.* was not bound by the composition, and that he was not estopped by his conduct from enforcing his execution against the debtor.—*Campbell* v. *Im Thurn* (1 C. P. D. 267) distinguished. *Ex parte* Lang. *In re* Lang 971

5. —— *Composition—Registration of Resolutions—Proxy signed in Blank—Objection to Proof—Notice to objecting Creditor of Application to register—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 16 (*sub-ss.* 6, 8), 71, 80 (*sub-s.* 8)—*Bankruptcy Rules*, 1870, *rr.* 85, 271, 275, 295.] *Held*, by the Court of Appeal (reversing a decision of *Bacon*, C.J.), that a proxy paper signed by a creditor, leaving the name of proxy in blank, may be filled up by the person to whom

BANKRUPTCY—*continued.*

the creditor has intrusted it, with a verbal authority to use it, and that when so filled up it will be valid.—*Held*, by the Court of Appeal (*Baggallay*, L.J., dissenting), affirming the decision of *Bacon*, C.J., that a creditor who has objected to a proof tendered at a meeting under a liquidation petition, and has had his objection marked upon the proof, ought to have notice given to him, either by the Registrar or by the person whose duty it is to register the resolutions passed at the meeting, of the time when and the place where the application for the registration of the resolutions is to be heard.—A creditor, who had objected to a proof of debt, had no notice given to him of the application to register the resolutions carried by means of that proof, and they were registered in his absence. He afterwards applied to the County Court Judge to vacate the registration, and upon the hearing of this application he insisted upon some technical objections, but did not ask to have the creditor, whose proof he had objected to, cross-examined, or adduce any evidence to shew the invalidity of the debt:—*Held*, by the Court of Appeal, that the irregularity had been cured, and that the registration ought not to be vacated. *Ex parte* Lancaster. *In re* Lancaster - - - 911

6. —— *Composition—Registration of Resolutions—Time for taking Objection to Proof—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 125, 126, 127—*Bankruptcy Rules*, 1870, *rr.* 271, 284, 295.] An objection to the proof of a creditor who has voted at the first meeting of creditors on a composition resolution is in time if taken at the second meeting.—*Semble*, that the objection would be in time if taken after the second meeting and before the registration of the resolution. *Ex parte* Weil. *In re* Mentrop - - 345

7. —— *Composition — Trustee to receive and distribute — Alleged Default by Debtor — Action by Creditor for Original Debt — Injunction — Discretion of Court—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 126.] When an action is brought by one of the creditors of a compounding debtor against the debtor for his original debt, the Court of Bankruptcy ought to restrain the action if it can see clearly that it is vexatious and without foundation, even though the question in dispute concerns only the debtor and the creditor who is suing.—But, if there is a substantial question to be tried, the action ought to be allowed to proceed. *Ex parte* Lopez. *In re* Lopez - - - - - - 65

8. —— *Debtor's Summons — Application to dismiss — Security — Discretion of Judge — Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 7.] A creditor issued a debtor's summons for £442, the alleged balance of an account for goods supplied. The creditor had previously brought an action and had issued another debtor's summons against the alleged debtor for the same sum. The action had been by consent dismissed for want of prosecution, and the summons had been also dismissed. The debtor applied to the Court to dismiss the second summons, and made an affidavit that he was not indebted in the sum claimed. On the hearing of the application, the proceedings in the action and on the first debtor's summons were put

BANKRUPTCY—*continued.*

in evidence. The debtor was not examined, and no other evidence was adduced on his behalf. The creditor was examined and cross-examined, and stated that he had made many applications during several years to the debtor for payment, and had been put off with excuses. The Registrar held that the debtor must give security for the alleged debt and costs, pending the trial of an action to establish the validity of the claim, and the decision was affirmed by the Chief Judge:—*Held*, that the Registrar was right in requiring security, there being ground for suspecting the solvency of the debtor.—In determining whether security ought to be given upon an application to dismiss a debtor's summons, regard must be had to the question of the debtor's solvency, as well as to the possibility of his establishing his defence.—The requiring of security being, however, a matter of judicial discretion, the Court of Appeal will not interfere with the exercise of the primary Judge's discretion unless it can see clearly that the discretion has been improperly exercised. *Ex parte* Marshall. *In re* Marshall - - 873

9. —— *Equitable Mortgage of Leaseholds—Deposit of Title Deeds without Memorandum—Trade Fixtures — Bankruptcy of Mortgagor — Rights of Trustee — Possession—Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36)—*Order and Disposition.*] The lease of a shipbuilding yard and the trade fixtures therein were assigned to a shipbuilder, to hold the leasehold premises for the residue of the term granted by the lease, and to hold the trade fixtures absolutely. He deposited the lease and the assignment with his bankers as security for advances made by them to him. No memorandum of charge was executed. The mortgagor afterwards filed a liquidation petition. The bankers had not taken any possession of the trade fixtures:—*Held*, that, as against the trustee in the liquidation, the bankers had no title to the trade fixtures. *In re* Trethowan. *Ex parte* Tweedy - - 559

10. —— *Execution against Trader for Sum exceeding £50—Expenses of Execution—Possession Money—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 87.] In ascertaining whether, under sect. 87 of the *Bankruptcy Act*, 1899, an execution against a trader is for a sum exceeding £50, all the expenses which the sheriff is entitled to charge at the time of the sale of the goods are to be included.—Therefore, possession money may be included where the sheriff has been compelled to take possession.—Decision of *Bacon*, C.J., affirmed. *Ex parte* Sims. *In re* Grubb - - - - - 375

11. —— *Judgment in Detinue — Execution levied after Notice of Bankruptcy of Defendant—Property in detained Chattel—Chattel in Possession of Trustee—Forcible Seizure by Plaintiff—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 78—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 19.] Judgment for the Plaintiff in an action of detinue held not to change the property in the detained chattel until satisfaction of the value found by the judgment; even though satisfaction was prevented by the bankruptcy of the Defendant.—*Brinsmead* v. *Harrison* (Law Rep. 6 C. P. 584; Ibid. 7 C. P. 547) followed.—The Plaintiff was entitled to apply to the Court of Bankruptcy for an order upon the trustee to deliver up the chattel to him. *Ex parte* Drake. *In re* Ware [866

BANKRUPTCY—*continued.*

12. —— *Liquidation by Arrangement — Summoning Debtor for Examination—Default in giving Information to Trustee—Power of Trustee—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 96, 125—*Bankruptcy Rules*, 1870, *rr.* 171, 301.] If the trustee in a liquidation by arrangement is dissatisfied with the information given to him by the debtor as to his debts and assets, he is entitled to summon the debtor for examination before the Court, and is not bound, before he can proceed with the examination, to shew that the debtor has made default in giving him the information which he is entitled to require.—Sect. 96 of the *Bankruptcy Act*, 1869, applies to liquidation by arrangement as well as to bankruptcy.—Decision of *Bacon*, C.J., in *Ex parte Glave* (3 Ch. D. 315) reversed. *Ex parte* Close. *In re* Bennett & Glave - - - - - 145

13. —— *Petition—Allegation of Act of Bankruptcy—Departing from Dwelling-house—"Intent to defeat or delay Creditors"—Formal Defect—Amendment—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 82—*Bankruptcy Rules*, 1870, *r.* 208.] A bankruptcy petition against a trader which alleges as an act of bankruptcy that he has departed from his dwelling-house or otherwise absented himself, must allege that he did so with intent to defeat or delay his creditors, otherwise the petition will be demurrable, and must be dismissed.—Such a defect is a matter of substance, not a merely formal defect, and it cannot be cured by amendment. *Ex parte* Coates. *In re* Skelton [979

14. —— *Proof — Bill of Exchange — Loan secured by Bills accepted by Borrower and by Assignment of Debts due to him—Negotiation of Bills — Bankruptcy of Acceptor — Application of Proceeds of Assigned Debts.*] Loans were made by *M.* to *K.* on the security of bills of exchange drawn by *M.* and accepted by *K.* The loans were also secured by the assignment to *M.* of debts due to *K.*, notice being given to the debtors. *M.* discounted the bills with his bankers. *K.* filed a liquidation petition, and the bankers proved in the liquidation for the full amount of the bills. The assigned debts not having been collected, it was arranged between *M.* and the trustees that the latter should collect them, and hold the proceeds without prejudice to *M.*'s rights. The debts having been collected, the trustee refused to pay over the proceeds to *M.* unless he would take up the bills:—*Held*, that, in the absence of the bankers, it could not be decided whether the proof upon the bills ought to be reduced by the proceeds of the assigned debts.—But, *held*, that *M.* was not entitled to the proceeds unless he took up the bills, and that the proper order to make was that the trustee should apply the proceeds in discharging *M.*'s liability upon the bills. *Ex parte* Mann. *In re* Kattengell - - - 367

15. —— *Proof — Delay — Bankruptcy Rules*, 1870, *rr.* 72, 73, 313.] The bank's proof was sent to the trustee in December, 1872. In December, 1875, he gave notice that he rejected the proof,

BANKRUPTCY—*continued.*

alleging as an excuse for the delay that he had only recently discovered the facts which justified the rejection:—*Held*, by *Bacon*, C.J., that it was too late for the trustee to give such a notice, but that he ought to have applied to the Court to expunge the proof. *Ex parte* Good. *In re* Armitage - - - - - - 46

16. —— *Proof — Provable Debt — Liability capable of being fairly estimated—Annuity during Widowhood—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 31.] A widow was entitled under the will of her husband to an annuity during her life or widowhood, and it was charged upon property bequeathed by him to his sons, and was further secured by the joint and several bond of the sons. The sons filed a liquidation petition:—*Held*, that the value of the contingency of the widow's marrying again was capable of being fairly estimated, and that proof must be admitted for the value of the future payments as ascertained by an actuary. *Ex parte* Blakemore. *In re* Blakemore - - - - - - 372

—— Practice—Time for appealing - - 365
See Practice. 7.

—— Sole Plaintiff—Continuance of action by trustee - - - - 844
See Practice. 10.

—— Practice—Time for appealing - - 61
See Practice. 6.

—— Stoppage *in transitu* - - - 35
See Sale of Goods. 2.

BANKRUPTCY RULES, 1870, rr. 72, 73, 313 46
See Bankruptcy. 15.

—— rr. 85, 271, 275, 295 - - - 911
See Bankruptcy. 5.

—— r. 143 - - - - 61, 365
See Practice. 6, 7.

—— rr. 171, 301 - - - - 145
See Bankruptcy. 12.

—— r. 208 - - - - - 979
See Bankruptcy. 13.

—— rr. 271, 284, 295 - - - 345
See Bankruptcy. 6.

—— rr. 273, 274 - - - - 971
See Bankruptcy. 4.

BILL OF COSTS - - - - 815
See Solicitor.

BILL OF EXCHANGE—*Equitable Assignment—Appropriation.*] *A.* consigned coffee to *M., L., & Co.*, and drew bills upon them, which they declined to accept. *R.* was the holder of some of these bills. *A.* finding that *M., L., & Co.* would not accept the bills, wrote to *S* requesting him to realize the coffee, honour the bills, telegraph for a remittance if the proceeds would not cover the bills, and conduct the business so as to prevent *A.'s* reputation from suffering. On the 14th of August, the day before the day on which the bills held by *R.* became payable, *S.* wrote to him a note specifying the bills and saying, "Take note that I expect to receive early next week delivery of the coffee sent by drawer against the above, and that I will then again write to you on this subject." Three days after this *S.* wrote to *R.*, "Referring to my memorandum of the 14th instant, *M., L., & Co.* have handed me the warrants for the coffee. I shall dispose of the same as instructed by sender, and will let you have further particulars in due time." On the same day *S.* was served with an attachment out of the Lord Mayor's Court at the suit of *M., L., & Co.*, as creditors of *E. A. & Co.*, whom they alleged to have an interest in the coffee. *R.* filed his bill to restrain the proceedings in the Lord Mayor's Court, and to establish his interest in the proceeds of the coffee. Vice-Chancellor *Hall* dismissed the bill on the ground that *R.* had not any specific charge on the proceeds, and therefore had no such title as would support a bill:—*Held*, on appeal, that the letters gave *R.* an equitable charge on the proceeds of the coffee, and that he had therefore a *locus standi* to maintain the suit. Ranken *v.* Alfaro - - - - - - 786

—— Bankruptcy of acceptor - - 367
See Bankruptcy. 14.

BILL OF SALE—Order and disposition 559, 740
See Bankruptcy. 1, 9.

—— Registration of - - - - 35
See Sale of Goods. 2.

—— Unregistered - - - 27, 809
See Bankruptcy. 2, 3.

BONDS—Payable by drawing—Unpaid bonds
See Interest. [287

BREACH OF TRUST — Co-trustees — Primary liability of one - - - 554
See Trustee. 2.

BROKER—Purchase for undisclosed principal
See Sale of Goods. 1. [195

BUILDING SOCIETY—*Rule as to Reference to Arbitration—Motion to stay Proceedings in Action—Jurisdiction of Court—Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 11—*Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42), *s.* 34.] The rules of a building society incorporated under the *Building Societies Act*, 1874, provided, pursuant to sect. 16, sub-sect. 9, of the Act, that disputes between the society and any of its members should be settled by reference to arbitration. A member of the society having commenced an action for account against the society:—*Held*, on motion to stay proceedings under the *Common Law Procedure Act*, 1854, s. 11, and the *Building Societies Act*, 1874, that the jurisdiction of the Court was ousted, and that the matters in dispute must be referred to arbitration. Wright *v.* Monarch Investment Building Society - 726

BURIAL ACTS—18 & 19 *Vict. c.* 128, *s.* 9—*Burial within* 100 *yards of a Dwelling-house—Injunction—"Threaten and intend."*] The Defendant, in 1865, obtained leave from the Home Secretary to convert a piece of land containing twenty acres into a cemetery. He could not succeed in doing so, and the land remained unaltered. In 1876 an attempt was made to get up a company for the purpose, but the attempt failed. In the following year the Plaintiff, who was owner of a dwelling-house within 100 yards of the nearest part of the land, wrote to the Defendant to the effect that unless the Defendant would give an undertaking not to use any part of the land for a cemetery, he should take legal proceedings. The Defendant replied to the effect that he had no present inten-

BURIAL ACTS—*continued.*

tion of converting the land into a cemetery; that he would not give any undertaking not to do so if he found it desirable; but that if he should hereafter wish to use the property in that way, he would give the Plaintiff two months' notice of his intention to do so; and he stated that he should not bury within 100 yards of the Plaintiff's house without consent. The Plaintiff thereupon commenced an action, and *Bacon*, V.C., granted an interlocutory injunction restraining the Defendant from using, "for burial or for a cemetery," the ground in question, "or any part thereof":—*Held*, on appeal, that the injunction must be dissolved, for that there was no such threat or intention to use any part of the ground for a cemetery as to warrant the interference of the Court by injunction, supposing such use to be unlawful:—*Held*, further, that an injunction in the above form could not, in any case, have been supported, for that, under 18 & 19 Vict. c. 128, s. 9, a cemetery may come within 100 yards of a house, the only thing prohibited being actual burial within that limit. Lord Cowley *v.* Byas - - - 944

CAPITAL OF COMPANY—Reduction of — 535
See Company. 4.

CASES—*Australian Direct Steam Navigation Company, In re* (Law Rep. 20 Eq. 325) distinguished - - - - 282
See Company. 11.

—— *Briggs* v. *Penny* (3 Mac. & G. 546) distinguished - - - - 225
See Will. 8.

—— *Brinsmead* v. *Harrison* (Law Rep. 7 C. P. 547) - - - - - 866
See Bankruptcy. 11.

—— *Brown & Sibley's Contract* (3 Ch. D. 156) dissented from - - - 504
See Will. 5.

—— *Brown* v. *Gellatly* (Law Rep. 2 Ch. 751) followed - - - - 542
See Administration. 1.

—— *Buxton* v. *Buxton* (1 My. & Cr. 80) followed
See Administration. 2. [598

—— *Campbell* v. *Im Thurn* (1 C. P. D. 267) distinguished - - - - 971
See Bankruptcy. 4.

—— *Cooper's Trust, Re* (4 D. M. & G. 757) explained - - - - 746
See Conversion.

—— *Cox* v. *Hickman* (8 H. L. C. 268) considered
See Partnership. 2. [458

—— *Crédit Foncier of England, In re* (Law Rep. 11 Eq. 356) not followed - - 535
See Company. 4.

—— *Ebbw Vale Steel and Iron Company, In re* (4 Ch. D. 829) followed - - 535
See Company. 4.

—— *Forbes' Case* (Law Rep. 19 Eq. 353) distinguished - - - - 963
See Company. 9.

—— *Forsbrook* v. *Forsbrook* (Law Rep. 3 Ch. 93) discussed - - - - 183
See Will. 6.

CASES—*continued.*

—— *Furber* v. *Finlayson* (24 W. R. 370) questioned - - - - 809
See Bankruptcy. 3.

—— *Glave, Ex parte* (3 Ch. D. 315) reversed 145
See Bankruptcy. 12.

—— *Hayes* v. *Hayes* (4 Russ. 311) overruled 183
See Will. 6.

—— *Honduras Oceanic Railway Company* v. *Tasker* (2 Ex. D. 301) followed - 695
See Practice. 12.

—— *Leather Cloth Company* v. *American Leather Cloth Company* (11 H. & C. 523) considered - - - - 850
See Patent. 1.

—— *Mollwo* v. *Court of Wards* (Law Rep. 4 P. C. 419) considered - - - 460
See Partnership. 2.

—— *Rideout's Trusts, In re* (Law Rep. 10 Eq. 49) considered - - - 545
See Evidence. 1.

—— *Singer Manufacturing Company* v. *Wilson* (2 Ch. D. 434) considered - - 850
See Patent. 1.

—— *Stephensons' Case* (45 L. J. (Ch.) 488) distinguished - - - - 963
See Company. 9.

—— *Toulmin* v. *Steere* (3 Mer. 210) distinguished
See Mortgage. [634

—— *Warren* v. *Rudall* (1 J. & H. 1) commented on - - - - - 221
See Title Deeds.

—— *Whitfield* v. *Clement* (1 Mer. 402) distinguished - - - - 776
See Will. 2.

—— *Worraker* v. *Pryer* (2 Ch. D. 109) followed
See Practice. 2. [540

CERTIFICATE—Charity Commissioners - 901
See Charity. 2.

CHAMPERTY—*Maintenance of Suit—Assignment of Right to proceed with Winding-up Petition—Fraud on the Companies Acts.*] A creditor of a company being unable to obtain payment of his debt presented a petition to wind up the company. Before the petition was heard he sold his debt and the right to proceed with the petition to a shareholder of the company, who obtained leave to amend the petition by making himself a co-Petitioner:—*Held*, that the sale of the right to proceed with a winding-up petition ought not to be allowed, and the petition was dismissed.—The order of Vice-Chancellor *Hall* discharged. *In re* Paris Skating Rink Company - - 959

CHARGE—Debts and legacies—Devise of trust estates - - - - - 504
See Will. 5.

—— On real estate—Failure of trust—Real or personal representative - - 746
See Conversion.

CHARITY — *Charitable Legacy — Object partly illegal—Repair of Tombs—Whole Fund given to valid Charity.*] A testator gave a fund to trustees upon trust to apply the income in keeping in repair certain tombs, and directed them to accumulate the surplus income from time to time till it amounted to £25 and upwards, and when that

CHARITY—*continued.*

took place to pay over in equal shares to the incumbents of two parishes for the benefit of poor persons, such sum as would reduce the accumulations to £20:—*Held*, that the invalidity of the trust for the repair of the tombs did not render the whole gift void, but that, the first object having failed, the will must be read as if nothing was applicable to the repair of the tombs, and that the whole fund went to the incumbents. *In re* Williams - - - - - 735

2. —— *Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *s.* 17—"*Suit or other Proceeding*"—*Certificate of Charity Commissioners.*] The governors of an endowed school commenced an action against the master to restrain him from presenting himself at the school or continuing to occupy the schoolhouse, on the ground that he had never been properly appointed to the mastership, was unfit to fulfil its duties, and had been removed by a resolution of the governors. The master demurred, on the ground that it did not appear that the action had been sanctioned by the Charity Commissioners:—*Held* (affirming the decision of the Master of the Rolls), that the sanction of the Charity Commissioners to a proceeding of this nature was not requisite. Holme *v.* Guy 901

CHEQUE—Gift of - - - - 730
See Donatio Mortis Causâ.

CHILDREN—Unborn—Gift to children's children
See Will. 6. [183

"CHILDREN OR THEIR ISSUE"—Exclusive power - - - - 622
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CHOSE IN ACTION—Married woman—Reduction into possession - - - 516
See Husband and Wife. 2.

COMBINATION—Trade-mark - - 353
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COMMISSIONERS—Charity - - 901
See Charity. 2.

COMPANY—*Forfeiture of Shares—Condition Precedent—Fixing Time for Payment of Call—Excessive Demand for Interest—Injunction—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *Table A., Clauses* 6, 17, 19.] The directors of a company, which was governed by the regulations of Table A. in the *Companies Act*, 1862, resolved on the 16th of September that a call of £2 per share be made, and that the shareholders be requested to pay the same as soon as possible. They afterwards, on the same day, gave verbal instructions to the secretary to make the call payable on the 16th of December, and he sent a circular notice to the shareholders accordingly. *J.*, one of the shareholders, did not pay the call, and on the 21st of December the secretary wrote to him, telling him that if he did not pay the amount of the call, together with interest at 5 per cent. from the date of the call, on or before the 31st of December, his shares would be liable to forfeiture. *J.* did not pay, and on the 4th of January the directors passed a resolution forfeiting his shares:—*Held*, that, as the notice of the 21st of December claimed interest from the date of the call, instead of from the day fixed for its payment, as provided by clause 6 of Table A., it was a bad notice, and the forfeiture was invalid, and an injunction was

COMPANY—*continued.*

granted restraining the company from proceeding further under the resolution of forfeiture.—*Semble*, that the time for payment of the call could not properly be fixed by a mere verbal direction to the secretary.—Decision of the Master of the Rolls reversed. Johnson *v.* Lyttle's Iron Agency - - - - - 687

2. —— *Promoter—Syndicate—Purchase by Company—Antecedent Contract—Agency—Fraud—Misrepresentation in Prospectus—Quorum of Directors.*] A lease of an island in the *West Indies* containing extensive deposits of phosphate of lime was, on the 30th of August, 1871, contracted to be sold subject to the sanction of the Court, to a person who was in fact the agent or trustee for a syndicate or group of speculators, and the contract was confirmed by the Judge in Chambers on the 15th of September. This agent, on the 20th of September, agreed to sell the property to a trustee for the Plaintiff company, registered the same day, for double the price at which he had purchased, and which had been paid. The main object of the new company, as stated by the memorandum of association, was to acquire the lease of the island and work the phosphates. There were five directors, who were named in the articles of association. Of these, two were away from *England* when the company was formed, and took no part in the management till after the purchase was completed; another was the trustee who purchased on behalf of the syndicate; and another, by arrangement made before the registration of the company, obtained his share qualification by gift or loan from the principal member of the syndicate, who in fact directly or indirectly selected all the directors. The fifth was independent of the syndicate. The three last-mentioned directors, at a board meeting on the 29th of September, adopted the contract for purchase:—*Held*, by *Malins*, V.C., (1) that the syndicate must be considered to have purchased the property as from the 30th of August, and, therefore, that from that date they were at liberty to dispose of it as they thought proper; and that, inasmuch as there was no one who, as representing the future company, could then treat the syndicate as being in a fiduciary relation towards him, the company were not entitled to set aside the contract because there was no disclosure of the price at which the syndicate had purchased, or to say that the syndicate were trustees for the company of the difference between the two purchase-moneys: (2) that the fact that the principal or active member of the syndicate had, as early as the 12th of September, commenced negotiations with some of the persons who afterwards became directors with a view to the formation of the company, did not make the syndicate promoters or agents of the company: (3) that though the acceptance of the contract for purchasing the lease of the island was the principal object for which the company was formed, it did not require more than the quorum to make it valid: (4) that when the company had entered into possession of the property in pursuance of a contract made on behalf of the company by three of the directors named in the articles of association, it was not open to the company afterwards to object as against the vendors to the validity of

COMPANY—*continued.*

the contract, on the ground that the three directors did not legally form a quorum of the body, or that one of the three was, as trustee for the syndicate, vendor, and, as director of the company, purchaser: (5) that the company was not entitled to set aside the contract on the ground that the prospectus, as framed by the syndicate, contained misstatements of the following nature, viz., that an erroneous inference had been drawn from the liquidator's statement as to results of the working of the phosphate on the island which gave a more favourable appearance than the facts justified: That an estimate of the amount of phosphate on the island, deduced from a survey, was referred to in a manner which made it appear as if the survey had been made for the purposes of the company, when it was in fact made several years before, since which time the phosphate had been extensively worked, it not being shewn that there was not still on the island the amount of workable phosphate mentioned in the survey: That it was stated that the directors had entered into a provisional contract for the purchase of a lease of the island, though all that had been done was that three out of the five members of the board had passed a resolution adopting, without investigation, a contract prepared before the formation of the company, and made between one of the three directors, the trustee for the vendors, and a nominee of the vendors, who acted as trustee for the future company.—*Held*, on appeal, that the syndicate, being the promoters of the company, stood in a fiduciary relation to it, and were bound to make a full and fair disclosure of their interest in the property: and that as they had suppressed the facts that they were the real vendors, and that they gave for the property only half what the company were going to give, and had obtained the acceptance of the contract from such a board as they created, and had inserted in the prospectus statements which would lead intending shareholders to believe that the contract had been approved by all five directors, there was no contract binding on the company, and the sale to the company must be set aside, and judgment given against the members of the syndicate for repayment of the purchase-money:—*Held*, also, that the estate of a deceased member of the syndicate was liable on the ground that he was a partner, and that the action therefore did not die with him.—*Semble*, also, that directors not being members of the syndicate were not liable. New Sombrero Phosphate Company *v.* Erlanger - 73

3. —— *Promoters—Sale of Forfeited Concession—Defective Title—Fraudulent Combination—Restitutio in integrum—Liability of Solicitors.*] Certain persons who were owners of a concession from a foreign government combined together to form a company to purchase the concession, knowing at the time that through their default it was voidable and liable to forfeiture. The owners and others who were promoters of the company fraudulently sold the concession, being aware of the infirmity of the title, to trustees for the intended company, and it was transferred to the company by the trustees, who were to be paid a portion of the purchase-money for their share in the transaction. The solicitors for the vendors, who were

COMPANY—*continued.*

also solicitors for the company, concealed the invalidity of the title, and the trustees neglected to require evidence to establish the title:—*Held* (affirming the decision of *Malins*, V.C.), upon a bill filed by the company against the owners of the concession, the promoters, the trustees, the directors, and the solicitors, that the owners and promoters must repay the whole purchase-money; that the trustees who received money in the nature of a bribe for neglecting their duty must repay what they had so received; and that all the Defendants, including the solicitors, must pay the costs of the suit. Phosphate Sewage Company *v.* Hartmont - - - - - - 394

4. —— *Reduction of Capital—Companies Act*, 1862, *s.* 12—*Companies Act*, 1867, *s.* 9.] Sect. 9 of the *Companies Act*, 1867, is to be read together with and as part of sect. 12 of the *Companies Act*, 1862; and the word "capital" in the later enactment means the same thing as the same word in the former—that is to say, nominal capital only. —Where the capital of a company has been issued and fully paid up, the Court has no jurisdiction to confirm a resolution for reduction of such capital. —*In re Ebbw Vale Steel, Iron, and Coal Company* (4 Ch. D. 827) followed.—*In re Crédit Foncier of England* (Law Rep. 11 Eq. 356) not followed. *In re* Kirkstall Brewery Company, Limited and Reduced - - - - - - 535

5. —— *Winding-up—Director—Original Director—Paid-up Shares—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.] A limited company was registered on the 6th of November, 1874, with articles of association which provided, among other things, that the share qualification of a director should be the holding of twenty-five shares in the company; that *M.* and others should be the first directors of the company; and that every director should vacate office by ceasing to be the registered holder of his qualifying number of shares. It was also provided that, in consideration of the services of the first directors, each of them should receive and be registered as the holder of twenty-five fully paid-up shares, which were to be forfeited in the event of his dying or ceasing to be a director by his own act or default. —*M.* attended a meeting of the directors on the 10th of November, but resigned office on the 12th. He never applied for any shares, but he was placed on the register as the holder of twenty-five shares:—*Held* (affirming the decision of the Master of the Rolls), that the shares for which *M.* was placed on the register were fully paid-up shares, and that as he had retired from the directorship the shares were forfeited, and his name ought to be removed from the list of contributories. *In re* Australian Direct Steam Navigation Company. Miller's Case - - - 70

6. —— *Winding-up—Director's Qualification—Paid-up Shares—Registration of Contract—Misfeasance by Director—Estimate of Damages—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 165—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.] The articles of association of a company did not require that a director should be qualified by holding any shares, but the directors passed a resolution (which was not in any way confirmed by the shareholders) that the qualification should

COMPANY—*continued.*

in future be 250 shares of £1 each:—*Held*, that this resolution could not alter the constitution of the company, and that a person who was afterwards elected a director, and who acted in that capacity, did not thereby enter into any implied contract to take or hold shares.—The directors of a company, in its name, entered into an agreement with *H.* that the capital of the company should be increased, and that he should endeavour to obtain subscribers for the new shares to be issued. He was to receive, by way of remuneration, a large commission on the nominal value of the new shares taken up, and also a number of shares issued as fully paid up to him or his nominees, of which 1000 were to be issued as soon as the directors had accepted four persons to be nominated by him as directors or trustees of the company. This agreement was registered. The company afterwards passed a special resolution to increase the capital to the extent mentioned in the agreement. *R.*, on the nomination of *H.*, agreed to become a director, on the understanding that he was to be qualified by holding 200 fully paid-up shares, which were to be found for him *H. R.* was afterwards elected a director, and acted as such. After his election a second agreement was entered into between the company and *H.*, by which it was arranged that 2000 specified shares should be allotted to him or his nominees, as part of the consideration to which he was entitled under the first agreement. The second agreement was also registered. After this 200 of the specified shares were, at the request of *H.*, allotted to *R.*, and were with his assent registered in his name as fully paid up. Nothing was, in fact, paid for them. The company was afterwards ordered to be wound up:—*Held*, that the arrangement with *H.* was fraudulent, and *ultrà vires*, but that, as *R.* had never agreed to take any but paid-up shares, he could not be placed on the list of contributories in respect of the 200 shares:—But, *held*, that *R.* had been guilty of a misfeasance in relation to the company, and that the Court could, under sect. 165, order him to pay to the liquidator the value of the 200 shares which he had obtained:—And, *held*, that there being evidence that shares had been about the same time allotted to *bonâ fide* applicants on the terms of their paying the full nominal value of them in cash, the real value of the shares must, as against *R.*, who was a wrongdoer, be taken to be the nominal value, and that he must pay the sum of £200 to the liquidator. *In re* British Provident Life and Guarantee Association. De Ruvigne's Case - - - - - - - 306

7. —— *Winding-up—Directors—Qualification given by Promoter—Misfeasance—Companies Act*, 1862, *s.* 165.] A director of a company received from one of the promoters a number of paid-up shares sufficient to qualify him as a director, and then took an active part in carrying out a conditional contract for the purchase by the company of a colliery belonging to the promoters, and for purchasing and working which the company was formed:—*Held* (affirming the decision of *Bacon*, V.C.), that the director was liable, under the 165th section of the *Companies Act*, 1862, to pay to the liquidator the value of the shares; and

COMPANY—*continued.*

that in the present case the shares were to be taken as having been worth their nominal amount. *In re* Caerphilly Colliery Company. Pearson's Case - - - - - 336

8. —— *Winding-up—Director—Qualification—Contributory.*] The articles of a limited company, after naming the first six directors, provide that no person should be qualified to be a director who was not a holder of shares in the company of the nominal value of £500. The board, who had power to appoint directors, purported to appoint *H.*, who neither held nor afterwards acquired any shares. *H.* attended two meetings of the board, and resigned his office in two months. On an application by the official liquidator to make *H.* a contributory in respect of fifty shares of £10 each:—*Held*, that his election as a director was void, and that he could not be made a contributory. *In re* Percy & Kelly Nickel, Cobalt, and Chrome Iron Mining Company. Hamley's Case - - - - - - - - 705

9. —— *Winding-up — Director — Election of Person disqualified from being a Director.*] It was provided by the articles of a company that no person not recommended by the board of directors for election as a director should be eligible unless at the time of election he had held twenty shares for two months. *B.*, who was not a shareholder, agreed to become a director, and was unanimously elected at a general meeting at which six of the seven directors, who were then the only shareholders, were present. *B.* did not act as a director, and before anything further had been done he wrote refusing to be connected with the company. The company nevertheless sent him a letter of allotment for twenty shares, of which he took no notice. The company was afterwards ordered to be wound up:—*Held*, by the Master of the Rolls, and by the Court of Appeal, that the fact that six of the seven directors voted for *B.* at the general meeting did not amount to a recommendation by the board, as they were not met in the capacity of directors; that *B.'s* election was, therefore, void, and that he was not a contributory.—*Forbes' Case* (Law Rep. 19 Eq. 353) and *Stephenson's Case* (45 L. J. (Ch.) 488) distinguished. *In re* East Norfolk Tramways Company. Barber's Case - - - - 963

10. —— *Winding-up—Lease—Claim of Mortgagee of Lessor in respect of Future Breaches—Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—"*Debts and Liabilities provable.*"] The enactment of sect. 10 of the *Judicature Act*, 1875, which provides that in the winding-up of companies the same rule shall prevail and be observed as to debts and liabilities provable as may be in force for the time being under the law of bankruptcy, does not comprise, among such liabilities, the obligations of a company in liquidation under covenants in a lease to pay rent and not to assign without consent, no breach having taken place.—A mortgagee in possession of a lessor to a company, now in liquidation, claimed to have impounded out of the assets a sum equal to the aggregate future rent, or such other sum as might be sufficient to provide for the liabilities of the company under the lease; or, if such sum could not be raised, to be admitted to prove for the

COMPANY—*continued.*

amount:—*Held*, that there was no privity of contract between the applicant and the company; and that until breach he could not have assets impounded or be admitted to prove; and claim dismissed. *In re* Westbourne Grove Drapery Company - - - - - 248

11. —— *Winding-up—Lien of Master of Ship for Disbursements—Leave to proceed in Admiralty—Appeal for Costs.*] *T.*, the master of a ship belonging to a company, drew a bill on the company for necessaries supplied to the ship, which was accepted, but was dishonoured at maturity. *T.* paid the bill, and claimed repayment from mortgagees who had taken possession of the ship. On the following day an order was made for winding up the company. *T.* then applied in the winding-up for leave to take proceedings in the Admiralty Court, and obtained an order giving him leave. The liquidator applied to discharge this order, and an order was made for the liquidator to pay into Court to a separate account to meet *T.'s* claim a sum of £150, which exceeded the principal and interest, *T.* undertaking not to proceed in the Admiralty Court; the payment to be without prejudice to any application by *T.* to increase the amount. The £150 was paid in, and *T.* applied to increase the amount so as to cover the costs of defending an action brought against *T.* by the holder of the bill, and the costs of *T.* of the application in the winding-up. Vice-Chancellor *Bacon* ordered the principal and interest on the bill to be paid to *T.* out of the £150, and the residue to be paid to the liquidator:—*Held*, on appeal, that though if there had not been mortgagees in possession of the ship the proper mode of enforcing *T.'s* lien on the ship would have been by application in the winding-up, as in *In re Australian Direct Steam Navigation Company* (Law Rep. 20 Eq. 325), the order giving leave to proceed in the Admiralty Court was a proper order, the mortgagees not being parties to the winding-up; and that *T.* was entitled to all his costs before the Vice-Chancellor as costs properly incurred by a mortgagee in enforcing his security:—*Held*, also, that the case was not within the rule that an appeal will not lie as to costs. *In re* Rio Grande Do Sul Steamship Company 282

12. —— *Winding-up Petition—Insolvency—Meeting of Shareholders—Companies Act*, 1862, *s.* 79, *sub-s.* 5; *ss.* 91, 149.] A petition for winding up a company was presented by three shareholders. It did not allege insolvency, but stated circumstances shewing that its condition was not hopeful, and that it had abandoned all but a very small part of its objects, and alleged that it was just and equitable that the company should be wound up. *Bacon*, V.C., being satisfied on the evidence that the company was substantially insolvent, ordered meetings of the shareholders to be held, that it might be ascertained whether they did not wish it wound up:—*Held*, on appeal, that, as the petition did not allege any of the cases mentioned in the first four sub-sections of sect. 79 of the *Companies Act*, 1862, and did not contain allegations sufficient to make a case for interference under the 5th sub-section, a winding-up order was not authorized, and that consequently no order ought to be made except to dismiss the petition. *In re* Langham Skating Rink Company - - - - - 669

13. —— *Winding-up Petition—Costs of Creditor opposing the Petition—Shareholder's Petition.*] The general rule that where a winding-up petition is dismissed the creditors who appear and oppose it are entitled to one set of costs, applies to a petition by shareholders, as well as to a petition by creditors. *In re* New Gas Company 703

14. *Winding-up — Preferred Shareholders — Transfer to New Company — General Meeting—Distribution of Assets — Companies Act*, 1862, *ss.* 133, 161.] At a general meeting of a limited company, having its capital divided into preferred and deferred shares, resolutions were passed by the statutory majority for a voluntary liquidation and transfer of the business to a new company in consideration of shares in the new company being allotted to the two classes of shareholders in the old company so as to give to the preferred shareholders a different proportion of the capital of the new company from that which they were entitled to in the old company. In an action by a dissentient preferred shareholder on behalf of himself and the other preferred shareholders:—*Held*, that sect. 161 of the *Companies Act*, 1862, only enables the general meeting to decide on the nature of the consideration to be accepted, and not on the mode of its distribution.—*Semble*, the only proper mode in which such consideration could be divided among the members of a company would be, under sect. 133 of the Act, according to their rights and interests in the company. Griffith *v.* Paget - - 894

15. —— *Winding-up—Signatories to Memorandum—Power of Directors to refuse Allotment.*] Upon the formation of a company nine persons signed the memorandum of association. At a preliminary meeting, attended by four of these persons, a resolution was passed that no shares be allotted to three of the signatories to the articles, and with their consent the deposit money was repaid to them. The articles contained no power to accept surrenders of shares:—*Held*, that the directors had no power to remit the shares; and that all those who had signed the articles were liable as contributories upon the winding-up. *In re* London and Provincial Consolidated Coal Company - - - - - 525

—— Champerty—Sale of winding-up petition 959
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CONVERSION—*Appointment of Real Estate subject to a Term—Direction to raise Money—Failure of Objects of Trusts—Intestacy of Appointee—Charge, Real or Personal Estate, in Heir.*] Real estate was appointed to *A.*, subject to a term of years in trustees, who were directed to raise a sum of money out of it and hold it on trusts for certain tenants for life and their children. *A.* died intestate, leaving an only son. The money was raised and applied for the benefit of the tenants for life who survived *A.* and died without issue:—*Held*, that the capital of the fund went to the personal representative of *A.*—*Re Cooper's Trusts* (4 D. M. & G. 757) explained. *In re* Newberry's Trusts [746
—— Delay—Discretion of executors - 598
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COPYHOLD — *Encroachment on Waste by Copyhold Tenant—Nature of Title acquired—Accretion to original Holding—Statute of Limitations—Mines and Minerals—Coprolites—Rights of Lord—Digging without Consent of Tenant—Measure of Damage—Custom to grant Waste as Copyhold—Evidence—Injunction—Trespass—Permanent Injury—Action by Reversioner—Costs—Wrongdoer.*] An encroachment made by a copyhold tenant upon the waste of the manor becomes, at any rate in a manor in which there is a custom that the lord may grant portions of the waste as copyhold, an accretion to the original holding, and the tenant acquires, by adverse possession, under the *Statute of Limitations*, only a copyhold title to the encroached land.—Coprolites beneath the surface of a copyhold tenement are minerals, and the property in them is in the lord, though, in the
COPYHOLD—*continued.*
absence of a special custom, he cannot dig for them without the permission of the tenant.—The lord of a manor, in which there was no custom authorizing him so to do, entered without permission on the land of a copyhold tenant, which was in the occupation of a tenant, and dug for and carried away coprolites. A large trench was dug, which, at the time when the copyhold tenant commenced a suit against the lord to restrain the trespass, was not filled up, though it was filled up and the surface restored before the suit came to a hearing. The digging was continued after the filing of the bill, and until the coprolites were exhausted:—*Held*, that, under the circumstances, the copyholder, though only a reversioner, could maintain a suit against the lord for an injunction and damages:—*Held*, also, that the proper measure of damage was the gross amount produced by the sale of the coprolites, less the expenses of the working, and such a sum by way of profit as would have induced a stranger to undertake the working.—As evidence of an alleged custom authorizing the lord of a manor, with the consent of the homage, to grant portions of the waste as copyhold, two admittances in pursuance of such grants, made respectively in 1849 and 1857, were produced:—*Held*, that, in the absence of any contradictory evidence, the custom was sufficiently proved.—A wrongdoer cannot be heard to complain that in proceedings hurriedly taken to stop the wrong the Plaintiff has not accurately stated his title, and in such a case the Defendant will not be relieved from the payment of the extra costs occasioned by the Plaintiff's mistake as to his title. Attorney-General *v.* Tomline 750
COPYRIGHT—*Dramatic Copyright—First Representation Abroad*—3 & 4 *Will.* 4, c. 15—5 & 6 *Vict.* c. 45—7 *Vict.* c. 12, *s.* 19.] The author of a dramatic work which has been first represented in a foreign country is not entitled to any exclusive right of representation in this country, the representation of a dramatic work being a publication of it within the meaning of the statute 7 Vict. c. 12, s. 19. Boucicault *v.* Chatterton - 267
2. —— *Periodical—Infringement—Registration before Publication*—5 & 6 *Vict.* c. 45, *ss.* 13, 18.] The proprietor of a book or periodical has no copyright therein under 5 & 6 Vict. c. 45, if it is not actually published at the date of its registration at *Stationers' Hall*.—Accordingly, where the proprietor of a periodical had registered its first number at *Stationers' Hall* before publication, although he had then entered on the register the date of its intended publication, which was the actual date:—*Held*, that, having regard to sects. 13 and 18 of the Act, and to the form of requiring entry of proprietorship in the schedule to the Act, he was not entitled to copyright in the periodical, nor to an injunction to restrain its alleged infringement. Henderson *v.* Maxwell (2) 892
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COVENANT—*Lease—Covenant not to let adjoining Property for Purpose of a Trade—Covenant not running with Land.*] *B.* demised an eating-house for a term of twenty-one years, and covenanted that he would not during the term let any house in the same street for the purpose of carrying on the business of an eating-house, provided always that the covenant should be binding only on *B.*, and not on his heirs, executors, administrators, or assigns. Subsequently *B.* let the adjoining house for twenty-one years to another person, who covenanted with him not to carry on there any trade or business without *B.'s* license. The first lease was subsequently assigned to the Plaintiff, and the second to *G.* The Plaintiff then brought an action against *B.* and *G.* to restrain *G.* from carrying on the trade of an eating-house on the premises comprised in the second lease, and to restrain *B.* from permitting him to do so:—*Held* (affirming the decision of *Fry*, J.), that *B.'s* covenant was not broken by *G.'s* carrying on the business of an eating-house, and that the Plaintiff had no equity to restrain *G.* from doing so. KEMP *v.* BIRD - - - - - - 549, 974

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—— Paid-up shares - - - - 70
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—— Qualification of - - 306, 336, 705, 963
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—— Judge—Debtor's summons—Security 873
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DOCK WARRANT - - - - 195
See SALE OF GOODS. 1.

DONATIO MORTIS CAUSÂ—*Special Case—Bankers' Cheques—Appropriation by drawing against Amount of Cheques.*] A cheque drawn by a testator payable to his wife or her order, given to her shortly before his death, indorsed by her and paid into a foreign bank against the amount of which she drew:—*Held*, a good *donatio mortis causâ*, although the cheque was not presented for payment at the bank on which it was drawn till after the death of the testator.—*Sed quære*, if the cheque had been payable to bearer. ROLLS *v.* PEARCE - - - - - - 730
DOUBLE INSURANCE - - - 569
See INSURANCE.

DRAMATIC COPYRIGHT - - - 267
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DRAWING BONDS—Interest on unpaid bonds
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ECCLESIASTICAL LEASE — *Hospital Lease beyond Twenty-one Years—Void or Voidable*—13 *Eliz. c.* 10, *s.* 3—*Action by Governors to avoid Lease—Statute of Limitations—Demurrer.*] In 1783 the then Governors of *Magdalen Hospital* demised certain property belonging to the Charity to a lessee for ninety-nine years at a peppercorn rent, and the property had been enjoyed under the lease ever since. In 1876 the present Governors of the Hospital brought an action claiming a declaration that the lease was void under the statute 13 Eliz. c. 10, and possession accordingly, whereupon the Defendants, who were persons claiming by derivative title from the original lessee, demurred to the statement of claim, on the ground that the action was barred by the *Statute of Limitations*:—*Held*, that the lease was not originally void, but only voidable at the option of the successive Governors of the Hospital; that the present Governors had, by bringing the action, exercised that option, and had avoided the lease; and that the *Statute of Limitations* did not commence to run till action brought, and therefore did not apply to the case. —Demurrer overruled. GOVERNORS OF MAGDALEN HOSPITAL *v.* KNOTTS - - - - 175

EJUSDEM GENERIS—Articles specifically enumerated - - - - 627
See WILL. 4.

ELECTION—*Trust Deeds—Appointments—Power of Revocation — Will — Compensation — Child Devisee predeceasing Testatrix—Charging Compensation on Devised Estate—Wills Act* (1 *Vict. c.* 26), *s.* 33.] By a deed, dated in 1848, a firm who had received advances from *S.*, a married woman, out of her separate estate, covenanted with trustees for payment to them of all moneys then advanced and to be advanced by *S.*, to the extent of £15,000 in the whole; such moneys being settled upon trust for such persons as *S.* should by deed or will appoint; and in default of appointment, for her separate use for life.—By a deed, dated in 1851, *S.* appointed the trust funds, after the deaths of herself and her husband, to her two sons, *W.* and *J.*, and her two daughters, *R.* and *H.*, in equal fourths, the daughters' shares being settled upon themselves for life, with remainder to their "children." The deed contained no power of revocation.—By another deed, dated in 1863, *S.* purported to revoke that appointment and to re-appoint the £15,000—together with a further sum of £20,000 thereby settled, and representing further advances to the firm—after the deaths of herself and her husband, among her said sons and daughters, the daughters' shares being settled upon themselves for life, with remainder to their "children." This deed also contained no power of revocation.—*S.'s* husband died in 1865, and subsequently, by two further deeds of appointment, neither of which contained any power of revocation, *S.* purported partially to vary the appointments made by the deed of 1863.

ELECTION—*continued.*

—By her will, dated in 1867, *S.* purported to revoke all the appointments, and gave all her real estate to her son *J.* in fee, subject to the payment thereout of a sum of £10,000 to her son *W.*: and she gave "all money standing to her credit or to the credit of any trustees on her behalf in the books of the said firm, and all her *L. & N. W. Railway* stock, and all other the residue of her personal estate, of which she should be possessed at her death, or over which she had or should have any power of disposition by will," in trust for her two daughters *R.* and *H.* in equal shares, such shares being settled upon themselves for life, with remainder to their "issue."—At the date of her will *S.* had a considerable balance standing to her credit in the books of the firm (which in 1870 was wound up), and she had also then standing in her name a sum of £10,000 *L. & N. W. Railway* stock representing moneys formerly advanced by her to the firm.—*S.* died in 1874, possessed of real estate in *Yorkshire*, exceeding in value the share appointed to *J.* by the deed of 1851, and to personal estate beyond the £35,000 settled by the deeds of 1848 and 1863, but she had no *L. & N. W. Railway* stock beyond that above mentioned. —*J.* died in 1873, before his mother, having by his will devised all real estate in *Yorkshire* to which he should be entitled at his death to his eldest son in fee; and he bequeathed all his residuary personal estate to his executors, upon trusts therein mentioned.—Upon *S.'s* death *J.'s* eldest son and devisee paid *W.* the £10,000 bequeathed to him by her will.—In an action instituted for the purpose of having the rights of the different parties claiming under the deeds and under *S.'s* will ascertained and declared:—*Held*, first, that *S.* having by her will shewn a clear intention to dispose of the property comprised in the appointments, the various persons claiming under her will were put to their election as between the benefits conferred on them by the deeds and the benefits conferred on them by the will; and, secondly, that, under sect. 33 of the *Wills Act*, *J.'s* estate was in the same position, *quoad* the will of *S.*, as if he had survived her; and that, consequently, as between his estate and her disappointed legatees, the latter were entitled to put his estate to election, or, in other words, to require his estate to make good the benefits intended for them by the will; but that no case of election arose as against his residuary legatees, and the liability to make good the one-fourth of the £15,000 taken by his residuary legatees was charged exclusively upon the *Yorkshire* estates in the hands of *J.'s* devisee.—The Court, however, declined at present to decide the rights of the parties under the deed of 1863, so as not to prejudice the future claims of the children of *S.'s* two daughters, who, with their children, were parties to the action.—The doctrine of election or compensation explained. PICKERSGILL *v.* RODGER - - - - 163

ENCROACHMENT—Waste of manor - 750
See COPYHOLD.

ENJOYMENT IN SPECIE—Long annuities 542
See ADMINISTRATION. 1.

ENTRY—Solicitor—Bill of costs—Want of particularity of charge - - - 815
See SOLICITOR.

EQUITABLE ASSIGNMENT—Consignment of goods - - - - 786
See Bill of Exchange.

EQUITY OF REDEMPTION—Purchase of, by joint mortgagee - - - - 634
See Mortgage.

ESTATE TAIL—Will—Gift to children's children
See Will. 6. [183

EVIDENCE—*Illegitimacy—Non-Access—Evidence of Husband*—32 & 33 *Vict. c.* 68.] *H. Y.*, who made his will, and died in March, 1875, gave the residue of his personal estate after the death of his daughter *A.* (described as the wife of *W. A.*) in trust for all or any of her children who should attain twenty-one or marry. The daughter died in April, 1876, without having made any appointment. On petition by one child, who claimed to be the only legitimate child of the daughter, the evidence of *A.'s* husband shewing that three children of *A.* born during the marriage and after the Petitioner were illegitimate was admitted; and it was *held* that the Petitioner only was interested in the fund.—*In re Rideout's Trusts* (Law Rep. 10 Eq. 41) considered. *In re* Yearwood's Trusts - 545

2. —— *Title to Land—Tithe Commutation Map*—6 & 7 *Will.* 4, *c.* 71, *s.* 64.] A tithe commutation map is not, under 6 & 7 Will. 4, c. 71, s. 64, admissible in evidence as shewing the boundary of land in a case of disputed title. Wilberforce *v.* Hearfield - - 709

—— Affidavit—Summons under Vendors and Purchasers Act - - - 601
See Vendor and Purchaser. 3.

—— Intention—Keeping mortgage alive - 634
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EXCLUSIVE POWER - - - 622
See Power.

EXECUTION—Sum exceeding £50—Act of bankruptcy - - - - 375
See Bankruptcy. 10.

EXECUTOR—Liability—Delay in conversion—Discretion - - - - 598
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—— Right to distribution of trust fund - 229
See Trustee Relief Act.

FIDUCIARY RELATION—Agent of foreign government—Bondholders - - 605
See Jurisdiction.

—— Promoter of company - - - 73
See Company. 2.

FIRE INSURANCE - - - - 569
See Insurance.

FOREIGN GOVERNMENT—Bonds of—Assets in *England* - - - - 605
See Jurisdiction.

—— Stocks of - - - - 710
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FOREST OF DEAN—Free miners - - 153
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FRAUD—Promoters of company—Vendors of concession - - - - 394
See Company. 3.

FRAUDS, STATUTE OF—*Vendor and Purchaser—Description of Vendor—"Trustee selling under a Trust for Sale"—Pleading—Demurrer—Rules of Court*, 1875, *Order* XIX., *rr.* 18, 23.] A contract for the sale of land in which the vendor is not named, but is stated to be "a trustee selling under a trust for sale," is sufficient within the *Statute of Frauds*.—A defence founded on the *Statute of Frauds* cannot now be raised by demurrer. Catling *v.* King - - - - - 660

2. —— *Vendor and Purchaser—Description of Vendors—"Proprietors"—Contract by Letters—Stipulation for formal Contract—Condition Precedent.*] An estate was offered for sale in lots shewn upon a plan on which various conditions were printed, one of which was that each purchaser would be required to sign a contract embodying the foregoing conditions, and providing for the completion of the purchase at the expiration of a period of not more than two months from the date of the contract. *M.* made a verbal offer to *W.*, the agent of the owners, to purchase certain lots for £1000. *W.* informed him that he must purchase subject to the conditions, and promised to lay his offer before the proprietors. Shortly afterwards *W.* wrote to *M.* saying that the "proprietors" accepted *M.'s* offer to purchase the specified lots for £1000, subject to the conditions on the plan, and that he had requested the solicitors to forward to *M.* the agreement for purchase. *M.* replied by letter that his offer had better be reconsidered unless he was left at liberty to build or not as he pleased. *W.* replied by letter that the acceptance by the proprietors was not conditional, and that *M.* would be at liberty to build or not. The contract was sent to *M.*, but he refused to sign it, or to proceed with the purchase:—*Held*, by the Master of the Rolls, that the word "proprietors" was sufficient to identify the vendors within the *Statute of Frauds*, and that specific performance must be decreed.—*Held*, by the Court of Appeal, that although the word "proprietors" was a sufficient description, specific performance could not be decreed, for that on the true construction of the documents the signing of a formal contract was a condition precedent to the parties being bound. Rossiter *v.* Miller - - - - - 648

3. —— *Specific Performance—Part Performance—Possession—Consideration of Marriage.*] A father verbally promised, in consideration of his daughter's marriage, to give her a house as a wedding present, and immediately after the marriage he put the daughter and her husband into possession. The father was then the owner of the house, which was leasehold and was subject to a charge in favour of a building society, payable by instalments. The father paid the instalments which fell due during his lifetime, and at his death there remained a balance of £110, which fell due shortly afterwards:—*Held* (affirming the decision of *Malins*, V.C.), that the verbal promise to give the house having been established, the possession took the case out of the *Statute of Frauds*; that the contract was to give the house free from incumbrances; and that the £110 was payable out of the father's estate. Ungley *v.* Ungley - - - - - 887

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See Practice. 5. [882

FREE MINERS - - - - 153
See Mine.

GALE—Gaveller—*Forest of Dean* - - 153
See Mine.

GENERAL DENIAL—Defence - - 781
See Practice. 13.

GENERAL GIFT—Articles—*Ejusdem generis* 627
See Will. 4.

GENERAL MEETING—Company—Power of 894
See Company. 14.

GEORGIA BONDS - - - - 710
See Will. 11.

GIFT—In prospect of death - - - 730
See Donatio Mortis Causâ.

—— On attaining twenty-one—Maintenance in meantime - - - - 837
See Infant.

GUARANTEE—One partner—Surety - 46
See Partnership. 3.

HOSPITAL—Lease of lands beyond twenty-one years - - - - - 175
See Ecclesiastical Lease.

HUSBAND AND WIFE—*Separate Estate—Business carried on before Marriage—Earnings during Coverture—Married Women's Property Act*, 1870 (33 & 34 *Vict. c.* 93).] A woman in 1855 entered the service of a man as housekeeper in a house which was in his occupation but was not his ordinary place of residence. He shortly afterwards engaged to marry her. In 1861 she commenced the business of preserving fruit, which was begun upon a small scale, but gradually became a large wholesale business. It was carried on by her in her own name; she kept a separate banking account; and he admitted that it was her own business, and was managed solely by her, though he sometimes assisted. In 1874 he married her. After the marriage the business was carried on by her as before, in her maiden name; her husband resided in the house where it was carried on, but it did not appear that he took any further part in it than he had done before the marriage. He shortly afterwards died intestate:—*Held* (affirming the decision of *Malins*, V.C.), that the stock-in-trade and capital of the business belonged to the widow, and were not part of the husband's estate. Ashworth *v.* Outram - - 923

2. —— *Wife's Chose in Action—Sale by Husband—Reduction into Possession—Right to set aside Sale.*] *A.* being entitled in right of his wife to a share of an intestate's estate, sold the share to *B.*, a solicitor, who conducted a suit to administer the estate. *A.* predeceased his wife, and *B.* died subsequently. A suit was instituted by the executors of *A.* to set aside the sale, on the ground that information in the possession of *B.* as to the real value of the property was concealed from *A.* at the time of the sale:—*Held*, upon a preliminary objection, that the sale by *A.* of his wife's *chose in action* was a reduction into possession, which was voidable under certain circumstances, and the right of avoidance being in the husband survived to his executors, and they were the persons entitled to sue, and not the wife's representatives. Widgery *v.* Tepper - - - - - 516

—— Evidence of non-access - - - 545
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ILLEGITIMATE CHILDREN—Evidence of non-access—Evidence of husband - 545
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IMPLICATION—Life estate—Conversion - 984
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INCLOSURE ACT—Right of way—Road for agricultural purposes - - - 133
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INCONSISTENT CLAUSES - - - 954
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INCONSISTENT RELIEF - - - 695
See Practice. 12.

INDORSEMENT—Writ—On behalf of all creditors - - - - - 540
See Practice. 2.

INFANT—*Will—Maintenance—Legacy on attaining Twenty-one, with Provision for Maintenance in meantime—23 & 24 Vict. c.* 145, *s.* 26.] The 26th section of the 23 & 24 Vict. c. 145, empowering trustees to apply towards the maintenance of an infant the income to which such infant may be entitled in respect of a legacy payable contingently on his attaining twenty-one. does not apply to a case where the infant on attaining twenty-one would not be entitled to interest on his legacy till the time of payment.—A testator declared that his personal estate should be held upon trust out of the annual produce to raise for every daughter who should be under age and unmarried the yearly sum of £50 for their maintenance and education, and to accumulate the surplus income as part of his residuary personal estate, and he bequeathed to each of his daughters a legacy of £4000 if and when they should respectively attain twenty-one or be married, and gave his residuary personal estate to his eldest son:—*Held* (reversing the decision of *Hall*, V.C.), that the legacies to the daughters did not carry interest until the time of payment, and that the Court had no power under the 26th section of the 23 & 24 Vict. c. 145 to apply any part of the income of the expectant legacies to the maintenance of the daughters. *In re* George (an Infant) - 837

—— Defendant in partition action - 263
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INJUNCTION—Action by creditor against compounding debtor - - - 65
See Bankruptcy. 7.

—— Action for—Notice of—Public Health Act
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—— Burial near a dwelling-house - - 944
See Burial Acts.

—— Obstruction to access to wharf - 713
See Riparian Owner. 1.

—— Pollution of stream - - - 769
See Riparian Owner. 2.

—— Trade-mark—Expired patent - - 850
See Patent. 1.

INROLMENT OF DECREE - - - 666
See Practice. 14.

INSOLVENCY—Company—Winding-up petition
See Company. 12. [669

INSURANCE—*Loss by Fire—Wharfingers' Policies—Merchants' Policies—Condition as to Double Insurance—Contribution.*] By floating policies of insurance effected by *B. & Co.*, wharfingers, they insured against loss or damage by fire, in the sums named, grain and seed, the assured's own or on commission, for which they were responsible, subject to conditions of average, and to this condition, that "if at the time of any loss or damage by fire happening to any property hereby insured, there be any other subsisting insurance or insurances, whether effected by the insured or by any other person, covering the same property, the company shall not be liable to pay or contribute more than its rateable proportion of such loss or damage." While these policies were subsisting a fire destroyed a quantity of grain stored with *B. & Co.*, part of which belonged to *R. & Co.*, who had also effected policies, called merchants' policies, on the grain thus destroyed, including also grain stored elsewhere, which policies contained the like conditions as the wharfingers' policies. *B. & Co.* were paid in full by the several insurance companies. In a suit to determine the liability of the companies *inter se*:—*Held* (affirming the decision of the Master of the Rolls), that the grantors of the merchants' policies were not liable to contribute to the loss; that *B. & Co.* were primarily liable, but, being indemnified by the grantors of the wharfingers' polices, the latter were ultimately liable:—*Held*, also, that the condition as to double insurance only applied to cases where the same property was the subject-matter of insurance, and where the interests were the same. North British and Mercantile Insurance Company *v.* London, Liverpool, and Globe Insurance Company 569

INTEREST—*Loan repayable by Drawings—Drawn, but Unpaid Bonds—Arrears of Interest—Redemption.*] A loan was secured by the issue of bonds bearing coupons for twenty half-yearly payments of interest, on the 1st of June and 1st of December, such bonds to be redeemable by half-yearly drawings of at least 5 per cent. on the total amount of the loan. A deed was executed, by which the borrowers granted certain foreign railways to trustees, and covenanted with them to remit half-yearly sums sufficient to pay the amount of interest and moneys required for redemption. On each 1st of December and 1st of June the moneys so to be remitted were to be applied in payment of the principal sums secured by such of the bonds as should have been drawn on the preceding 1st of November and 1st of May, as the case might be, and of the interest on such of the bonds as should be outstanding and bearing interest which would become payable on such 1st of December or 1st of June, but it was declared that no interest should be payable on any drawn bond after the day fixed for its redemption. In case of default in the remittances, the trustees were to enter into possession of the railways, and apply the net profits (1) in payment of all arrears of interest due on such of the bonds as should be outstanding and bearing

INTEREST—*continued.*
interest; (2) in redemption of such an amount of bonds as ought to have been redeemed on any previous 1st of June or 1st of December, but might not have been redeemed through failure of the borrower to remitfunds; and lastly, in payment of the future interest on the bonds and the redemption of the same in any future half-year; and after full payment and satisfaction of all the principal moneys and interest secured by the bonds, the trustees were to hold the surplus in trust for the borrowers. Default was made in the remittances, the trustees took possession, and in November, 1876, had a fund in hand out of which they proposed to pay interest on the undrawn bonds only. Bonds to the amount of 10 per cent. on the whole loan had been drawn in November, 1875, and May, 1876, but had not been paid through want of funds:—*Held*, by the Master of the Rolls, that no interest was payable on any bond drawn for payment after the day fixed for its redemption, and that the trustees therefore could not be restrained from applying the moneys in their hands in payment of interest on the undrawn bonds, making no provision for interest on drawn bonds which remained unpaid through want of funds:—*Held*, on appeal, that drawn bonds which remained unredeemed through failure of the borrower to provide funds, could only be redeemed by payment of the principal with interest up to the time of payment:—*Held*, by *James*, L.J., and *Amphlett*, J.A., that the funds were to be applied in the first place in payment of interest *pari passu* on undrawn bonds, and on drawn bonds which remained unpaid through the failure of the borrowers to provide funds; *dissentiente Brett*, J.A., who was of opinion that the payment of interest on undrawn bonds had priority over the payments in redemption of drawn bonds. Gordillo *v.* Weguelin 287

—— Administration—Advancement to son 538
See Administration. 3.

—— Excessive demand—Forfeiture of shares 687
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See Practice. 15.

INVESTMENT—Investment clause in will 710
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ISSUE—"Children or their issue"—Substitution
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See Practice. 12.

JOINT AND SEPARATE DEBT—Payment of debt to one debtor - - - 800
See Will. 1.

JOURNEY—Solicitor—Without instructions—Bill of costs - - - - 815
See Solicitor.

JURISDICTION—*Bonds of Foreign Government—Application for Payment out of Assets in England—Principal and Agent—Fiduciary Relation.*] The Plaintiff was the holder of bonds at 6 per cent. interest issued by a foreign republic through the Defendants, who were their agents in *England*,

JURISDICTION—*continued.*
by which the foreign republic, upon the national faith, pledged the general revenue of the republic, and especially the free proceeds of the guano imported by the republic into the *United Kingdom*, after the engagements contracted on them were covered, and bound itself in all the contracts which it might enter into for the sale of the guano to set aside in each half year a sum sufficient for the service of the half year, and after such service was secured, to dispose freely of the surplus. The Plaintiff brought an action on behalf of himself and all other holders of the bonds, stating in his claim that the republic had from time to time forwarded to the Defendants large quantities of guano for the purpose of paying the interest on the bonds, which they refused to apply for that purpose, and threatened to apply in satisfaction of a lien claimed by themselves; and he claimed a declaration that he and the other bondholders had a claim upon the proceeds of the guano in priority to any claim by the Defendants. He also alleged that the foreign republic made no claim to the proceeds of the guano, but offered to make it a party if it should so desire.—The Defendants demurred to the statement of claim, on the ground that the Plaintiff had no charge on the proceeds of the guano, and also on the ground of want of jurisdiction and want of parties:—*Held* (affirming the decision of *Hall*, V.C.), that no fiduciary relation was alleged between the Defendants and the Plaintiff; that the guano being the property of a foreign government, the Court had no jurisdiction to attach it or the proceeds of the sale thereof; and that the Defendants, being agents of the foreign government, could not be sued in the absence of their principal.—The demurrer was therefore allowed. TWYCROSS *v.* DREYFUS 605

—— Building society—Action by member—Arbitration - - - - 726
See BUILDING SOCIETY.

—— Patents—Master of the Rolls - - 503
See PATENT. 2.

—— Reference to special referee—Scientific investigation - - - 592
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JURY—Trial by—Chancery Division 235, 241, [512
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KEEPER OF RECORDS—Jurisdiction of—Patent Office - - - - 503
See PATENT. 2.

LEASE—Covenant not running with the land—Covenant not to let for eating-house [549, 974
See COVENANT.

—— Hospital—Beyond twenty-one years - 175
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LEASEHOLDS—Assignment—Consideration 619
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LEGACY—On attaining twenty-one - 837
See INFANT.

LESSOR—Claim in winding-up—Future breaches [248
See COMPANY. 10.

LIABILITY—Estimation of—Proof in bankruptcy [372
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LIABILITY—*continued.*
—— Executor—For not converting - 598
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—— Trustees—Breach of trust - - 554
See TRUSTEE. 2.

LIEN—Goods of foreign government — Bondholders - - - - 605
See JURISDICTION.

—— Master of ship—Claim against company 282
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—— Unpaid vendor—Sale of goods 195, 205
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LIFE ESTATE—Implication - - 984
See WILL. 3.

LIMITATIONS, STATUTE OF—Void lease by hospital - - - - - 175
See ECCLESIASTICAL LEASE.

LIQUIDATION—Examination of debtor - 145
See BANKRUPTCY. 12.

LOAN TO PARTNERSHIP—28 & 29 Vict. c. 86 [458
See PARTNERSHIP. 2.

LONG ANNUITIES—Enjoyment in specie 542
See ADMINISTRATION. 1.

LORD OF MANOR—Rights of - - 750
See COPYHOLD.

LUNACY—*Permanent Improvements—Mortgage of Lunatic's Estate*—16 & 17 *Vict. c.* 70, *s.* 118.] Repairs and permanent improvements to a large amount upon an estate of which a lunatic was tenant in tail in possession were found to be expedient. There was in Court a sufficient fund of personalty to which the lunatic was absolutely entitled, and his income was much more than sufficient for his requirements. The amount required for repairs and improvements was ordered to be raised by mortgage or charge of the settled estate. *In re* GIST (A PERSON OF UNSOUND MIND) 881

LUNATIC TRUSTEE—Trustee Acts - 982
See TRUSTEE ACTS.

MAINTENANCE OF INFANT—23 & 24 Vict. c. 145, s. 26 - - - 837
See INFANT.

MAINTENANCE OF SUIT - - - 959
See CHAMPERTY.

MANOR—Rights of lord—Encroachments by copyholder - - - - 750
See COPYHOLD.

MARRIAGE — Consideration of — Statute of Frauds - - - - 837
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MARRIED WOMAN - - - 516, 923
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MASTER OF SHIP—Lien for disbursements—Claim against company - - 282
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MASTER OF THE ROLLS — Jurisdiction of — Patent Office - - - 503
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MEETING OF CREDITORS—Composition 911, [971
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MEETING OF SHAREHOLDERS — Winding-up petition - - - - 669
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MEMORANDUM OF ASSOCIATION—Subscribers of—Power to remit shares - 525
See Company. 15.

MINE—*Forest of Dean—Free Miners—Death—Gales—Priority of Application—Forfeiture—Surrender—Three Gales*—1 & 2 *Vict. c.* 43, *ss.* 23, 38, 60, 61, *and* 24 & 25 *Vict. c.* 40.] Under 1 & 2 Vict. c. 43, ss. 23, 38, gales can be granted only to free miners of the *Forest of Dean;* therefore where a free miner dies after an application for a gale, but before the gale has been actually granted: —*Held* (reversing the decision of *Malins*, V.C.), that the gale cannot be granted to his devisees not being free miners.—*Per Malins*, V.C.: Where several persons have applied for a grant of the same gale, and a grant has been made to one, the rights of all the other applicants are extinguished; and on the forfeiture of the gale the first applicant after the forfeiture, and not the next on the list of the former applicants, is, under sect. 60, entitled to the gale.—*Per Malins*, V.C.: A free miner can, under 1 & 2 Vict. c. 43, s. 61, hold only three gales; but where a free miner has had three gales, and has surrendered one of them on the ground that it contained an insufficient amount of coal to be profitably worked, he having a right to surrender exhausted gales, the surrender is valid, and the free miner is no longer the holder of three gales, so that he can apply to have another gale granted to him. James *v.* The Queen - 153

—— Manor—Right of lord - - - 150
See Copyhold.

MISREPRESENTATION—User of word "Patent" after expiration of patent - 850
See Patent. 1.

MISTAKE—Will—Amount of debt - 776
See Will. 2.

—— Will—Inconsistent clauses - - 954
See Will. 7.

MORTGAGE—*Equity of Redemption, Purchase of, by First Mortgagee—Effect on Rights of Second Mortgagee—Intention—Evidence.*] After a decree in a foreclosure suit to which both the mortgagor and the first and second mortgagees were parties, the Plaintiff, the first mortgagee, purchased the equity of redemption from the trustee in bankruptcy of the mortgagor, and by the deed of assignment, in consideration of £1380 (the sum due on the first mortgage), retained by the first mortgagee "in full satisfaction of" his debt, and of £20 paid to the trustee (making the purchase-money of £1400), the trustee assigned the mortgaged property to the first mortgagee, "subject to the aforesaid claim" of the second mortgagee. The value of the mortgaged property did not exceed £1380. The second mortgagee contended that the effect of this purchase was to extinguish the first mortgage debt, and to let in his own charge as a first incumbrance. A correspondence took place between the solicitors of the first mortgagee and the trustee at the time of the purchase: —*Held*, by the Court of Appeal (affirming the decision of *Hall*, V.C.), that looking at the surrounding circumstances the conveyance sufficiently expressed an intention to keep the first

MORTGAGE—*continued.*

mortgage alive; and that *Toulmin* v. *Steere* (3 Mer. 210) did not apply.—*Held*, also, by the Vice-Chancellor, that, the question being one of intention, a correspondence between the solicitors of the first mortgagee and the trustee in bankruptcy at the time of the purchase, was admissible in evidence, on the question whether it was intended to keep the first mortgage alive.—The rule in *Toulmin* v. *Steere* is not to be extended; and whether that decision is binding on the Court of Appeal, *quære*. Adams *v.* Angell - - 634

—— Breach of trust—Liability of co-trustee 554
See Trustee. 2.

—— Deposit of deeds—Order and disposition 559
See Bankruptcy. 9.

—— Lunatic's estate—Permanent improvement
See Lunacy. [881

MOTION—For order on admissions - 342
See Practice. 16.

—— To commit - - - - 943
See Practice. 4.

NAVIGABLE RIVER—Riparian owner—Access to wharf - - - - 713
See Riparian Owner. 1.

NEW TRUSTEE—Appointment of—Trustee Acts
See Trustee Acts. [982

NEW YORK STOCKS - - - - 710
See Will. 11.

NON-ACCESS—Evidence of husband - 545
See Evidence. 1.

NOTICE—Action—Public Health Act - 347
See Public Health Act. 1.

—— Assignment of trust fund - - 61
See Trustee. 1.

—— Bankruptcy—Execution - - 866
See Bankruptcy. 11.

—— Motion for attachment—Service on solicitor
See Practice. 18. [511

NOVATION—Partnership—Death of partner—Bankers - - - - 255
See Partnership. 1.

OHIO STOCKS - - - - 710
See Will. 11.

ORDER AND DISPOSITION - 559, 740
See Bankruptcy. 1, 9.

OSTENSIBLE PARTNER - - - 46
See Partnership. 3.

PAID-UP SHARES - - - 70, 306
See Company. 5, 6.

PAROL ASSIGNMENT—Copyright - 892
See Copyright. 2.

PART PERFORMANCE—Statute of Frauds 887
See Frauds, Statute of. 3.

PARTITION—*Action for—Right to Sale instead of Partition—Infant Defendant—Partition Act*, 1868 (31 & 32 *Vict. c.* 40), *s.* 4.] Under the 4th section of the *Partition Act* of 1868, it is the right of a Plaintiff entitled to a moiety of the property to have a sale instead of a partition, notwithstanding the opposition or disability of a Defendant

PARTITION—*continued.*

who is entitled to the other moiety, unless such Defendant shews "good reason to the contrary."—Upon the request of a Plaintiff so entitled, the Court decreed a sale instead of a partition of ten leasehold houses held under one lease, although it was objected on behalf of an infant Defendant entitled to the other moiety that his income would be thereby materially diminished. Rowe *v.* Gray - - - - - 263

PARTNERSHIP—*Bankers—Depositors—Death of Partner—Proof against New Partner—Liability of Deceased Partner's Estate—Fresh Receipt Notes—Novation.*] Prior to April, 1872, a firm of bankers, consisting of two partners, *A.* and *B.*, received money on deposit at interest, for which they gave deposit notes in the usual form to the depositors, who, when the amount on deposit was increased or diminished, gave up their old notes and received fresh ones for the new amount. In April, 1872, *X.* and *Y.* were admitted into the partnership, and notice of the change in the firm was given to the depositors. A fortnight afterwards *A.* died, and the business was carried on under the same firm by *B.*, *X.*, and *Y.* In 1874 *B.* died, and the business was carried on by *X.* and *Y.*, still under the same firm, until 1875, when the bank stopped payment, and went into liquidation.—The depositors all knew of *A.'s* death, and none of them made any claim against his estate. Some of them had not altered the amount of their deposit, but retained the notes they had received in his lifetime. They had, however, received interest from *X.* and *Y.* Others had increased and others had diminished the amount of their deposit after *A.'s* death, receiving in each case fresh deposit notes; and they had all proved in the bankruptcy of *X.* and *Y.* for the amount due on their notes as money "advanced and lent" to the bankrupts:—*Held*, that in each case there had been a complete novation, and that none of the depositors were entitled to prove against the estate of *A.* Bilborough *v.* Holmes [255

2. —— *Partnership (Bovill's) Act*, 1865 (28 & 29 *Vict. c.* 86)—*Loan Deed—Unsigned Contract—"Contract in Writing"—Trial of Action—Deciding Question of Law before one of Fact—Rules of Court*, 1875, *Order* XXXIV., *r.* 2—*Action on Bill of Exchange in Chancery Division—Costs—"Higher Scale"—Additional Rules of Court* (12*th August*, 1875), *Order* VI., *rr.* 2, 3.] The 1st section of *Bovill's Act* (28 & 29 Vict. c. 86) does not apply to any contract unless the advance of money under it would, independently of that Act, have created the relation of debtor and creditor as distinguished from the relation of partners.—Under a partnership deed, dated in October, 1868, *B.* and *H.* agreed to enter into a trade partnership under the firm of "*B. & Co.*" for fourteen years from the 1st of July, 1868; the capital to consist of £30,000, of which part was to be brought in by *B.* and *H.*, and £10,000 was to be raised "by way of loan under the *Partnership (Bovill's) Act*, 1865 (28 & 29 Vict. c. 86), in sums of £500 each, from persons willing to advance the same for the purposes of the partnership;" the capital to be considered as divided into sixty equal parts of £500 each, of which forty were to belong to *B.* and *H.*, and the

PARTNERSHIP—*continued.*

remaining twenty were to be appropriated to "the persons so advancing by way of loan," in proportion to the advances; the net profits of the partnership to be similarly divided into sixty equal parts, of which twenty were "to be divided among the persons so advancing by way of loan," in proportion to the advances; provided, that if the whole of the £10,000 should not be raised by way of loan (as it was not), and until the sum should be so raised, the net profits should be divided into as many shares as there should be sums of £500 in the capital of the partnership, and be paid yearly, on the 1st of October, to the said persons on account of their respective shares of profits; on the expiration or sooner determination of the partnership a general account and valuation to be taken, and the partners to pay "to the persons advancing money by way of loan for the capital of the partnership," as aforesaid, the moneys advanced by them respectively, less any sums overpaid to them on account of profits, and divide the profits in the proportions above specified. The deed also contained a stipulation that the parties thereto should, during the continuance of the partnership, conduct the business to the best of their ability; and other provisions usually inserted in partnership deeds.—Shortly after the date of this deed, the Defendant, *D.*, advanced to *B.* and *H.* the sum of £500 upon certain terms stated in the draft of an intended deed, which, however, was never executed. This draft deed was expressed to be made between *B.* and *H.*, "co-partners," of the one part, and *D.* of the other part; it recited the partnership deed, and that *D.* had "agreed to advance by way of loan to *B.* and *H.*, under the provisions of the said Act, the sum of £2500 to enable *B.* and *H.* to carry on the said business for the term, and subject to the conditions thereinafter mentioned:" it then witnessed that "in consideration of the sum of £2500 advanced" by *D.* to *B.* and *H.*, the latter covenanted "that they would on the 1st of July, 1882, or on the sooner determination of the partnership, pay *D.* the sum of £2500:" that they would in all things conform to the aforesaid deed of partnership, which should at all times be open to *D.'s* inspection: that they would every year, "during the continuance of the loan," make out proper accounts and permit *D.* to take copies: and would on the 1st of October in every year, "during the continuance of the loan," pay to *D.*, on account of profits, a sum equivalent to five-sixtieth parts of the net profits in the year preceding the 1st of July then last; provided, that if the full sum of £10,000 should not be advanced as contemplated by the said deed of partnership, *B.* and *H.* would yearly, on the 1st of October, pay to *D.*, in lieu of the said five-sixtieth parts of the net profits, such a proportion of the net profits as the £2500 bore to the whole capital employed in the business: that if *D.* should become bankrupt, *B.* and *H.* might pay *D.* the £2500, less any sum overpaid to him "on account of the business," together with the share of profits (if any) to which he should have become entitled, whereupon the present deed should be void: that on the expiration or sooner determination of the partnership, *B.* and *H.* should make out a final account and valuation of the partnership moneys and effects, and then pay

PARTNERSHIP—*continued.*

thereout to *D.* the £2500 and five-sixtieths of the net profits, or, if the full £10,000 should not have been advanced, then, in lieu of such five-sixtieths, such a proportion of the net profits as the £2500 bore to the capital employed in the business; provided that if, at the end of the fourteen years or sooner determination of the partnership, it should appear, upon taking the final account, that *D.'s* share in the net profits during the continuance of the partnership should not have amounted to the total of the annual sums received by him on account of such profits, then *D.* should refund to the partnership the difference between the amount of the said annual sums and the real amount of his share in the net profits, but should not, in any event, be called on to refund more than £2500. The deed then concluded with the usual arbitration clause.—The two other Defendants made advances to *B.* and *H.* under deeds duly executed in the same form in all respects as *D.'s* draft deed. —The firm of "*B. & Co.*" having become bankrupt, *P.*, the holder of various bills of exchange drawn or accepted by the firm, brought an action against *D.* and the other Defendants, claiming a declaration that the several Defendants were partners in the firm, and as such liable on the bills:—*Held*, that, as between *B.* and *H.* on the one hand, and the several Defendants on the other, the transaction was not one of loan within the Act, the true relation of the parties being that of active and dormant partners, and not merely of debtor and creditor; and that the several Defendants were liable, as partners, for the whole of the partnership debts.—An unsigned contract for an advance by way of loan to a trader is not "a contract in writing with a person" within the 1st section of the Act, though it is admissible in evidence as shewing the terms upon which the advance was made.—In the absence of something in the contract to shew a contrary intention, the right to share profits, as profits, constitutes, according to English law, a partnership.—The principles of partnership considered and explained.—*Cox* v. *Hickman* (8 H. L. C. 268), and *Mollwo, March, & Co.* v. *Court of Wards* (Law Rep. 4 P. C. 419), considered. Pooley *v.* Driver - 458

3. —— *Release of one Joint Debtor—Ostensible Partner—Surety.*] *J.* gave to a bank a guarantee for £1000 in favour of *A. & Co.*, representing at the same time to the bank manager that he was a partner in that firm, but that he wished the fact of his partnership to be kept secret. The guarantee described him as a partner in the firm. Some time afterwards *A.* alone, as *A. & Co.*, filed a liquidation petition, and the bank tendered a proof in the liquidation for advances which they had made to *A. & Co.* after the guarantee. After this the bank sued *J.* at law for £5659, alleging him to have been a partner with *A.* *J.* filed a bill in Chancery to restrain the proceedings in the action, denying the alleged partnership. A compromise was entered into between the bank and *J.*, by which £2818 was paid to them in satisfaction of their claim against *J.* and of a claim which they made against *S.*, who had also given them a guarantee on behalf of *A. & Co.* *J.'s* guarantee was given up to him, a receipt for £1000 being indorsed on it by the bank manager "in payment and discharge of the within guarantee, and also of all claims against *J.* in reference to or in connection with *A. & Co.*":—*Held*, by the Court of Appeal, that *J.* must be taken to have been an actual partner with *A.*, but that the receipt did not operate to release *J.* so as to preclude the bank from maintaining a proof against *A.'s* estate. —*Per Bacon*, C.J.: Though a creditor has a right to sue jointly with his debtor a person who has held himself out as a partner with the debtor, yet, as between themselves, the ostensible partner is a surety only, not liable to contribution, and therefore a release of the ostensible partner by the creditor does not release the debtor. *Ex parte* Good. *In re* Armitage - - - 46

PATENT — *Injunction—Expired Patent—Trade-mark—Retention on Label of Word "Patent"—Misrepresentation.*] In 1862 a patent for improvements in filters was taken out by *S. C.* in the name of himself and of his son *G. C.*, aged seventeen. After the death of *S. C.* in the same year, the business was carried on by *G. C.*, who made and sold filters under the title, and marked with a label as "*S. C.'s* Improved Patent Gold Medal Self-cleaning Rapid Water Filters." The patent of 1862 was allowed to lapse in 1865. In 1867 *G. C.*, who had then attained twenty-one, altered his label to "*G. C.'s* Improved Patent Gold Medal Self-cleaning Rapid Water Filters," above which was a medallion containing the royal arms, surmounted by the words "By Her Majesty's Royal Letters Patent." The Defendants, who had been in *G. C.'s* employ, set up in business in the same town in 1876 as makers and sellers of filters, which were similar in appearance to those of *G. C.*, and inscribed with "*S. C.'s* Patent Prize Medal Self-cleaning Rapid Water Filters, Improved and Manufactured by *W. & Co.*":—*Bacon*, V.C., having granted an injunction restraining the Defendants from using their label,—*Held*, by the Court of Appeal (reversing the Vice-Chancellor's decision), —First, that the label used by the Plaintiff was not a trade-mark, but only a description of the article as made according to *S. C.'s* patent, which was common to all the public:—Secondly, that there was nothing in the Defendants' label calculated to mislead the public by a fraudulent imitation of the Plaintiff's label:—Thirdly, that the Plaintiff's label, coupled with the medallion of the royal arms, constituted a false representation that the patent was still subsisting, and disentitled the Plaintiff to relief by injunction.—*Singer Manufacturing Company* v. *Wilson* (2 Ch. D. 434) and *Leather Cloth Company* v. *American Leather Cloth Company* (11 H. L. C. 523) discussed. Cheavin *v.* Walker - - - - - 850

2. —— *Specification—Clerical Error—Amendment—Jurisdiction of Master of the Rolls—Judicature Act*, 1873, *s.* 17, *sub-s.* 6.] The Master of the Rolls has jurisdiction, as Keeper of the Records, to direct the amendment of a clerical error in a specification filed in the Patent Office, such jurisdiction being saved by the *Judicature Act*, 1873, s. 17, sub-s. 6.—Where any such amendment has been directed, notice of the order should be given to the Commissioners of Patents, so that the specification may be reprinted. *In re* Johnson's Patent - - - - - 503

PERMANENT IMPROVEMENTS—Lunatic's estate - - - - 881
See Lunacy.
PERPETUITY—Gift to charity—Repair of tomb
See Charity. 1. [735
PETITION—Bankruptcy - - - 979
See Bankruptcy. 13.
—— Winding-up—Sale of right to petition 959
See Champerty.
—— Winding-up - - - 669, 703
See Company. 12, 13.
PLEADING—Defence—General denial - 781
See Practice. 13.
—— Demurrer—Statute of Frauds - - 660
See Frauds, Statute of. 1.
—— Joinder of debts - - - 695
See Practice. 12.
POLICY OF INSURANCE—Wharfinger's contribution - - - - - 569
See Insurance.
POLLUTION OF STREAM - - - 769
See Riparian Owner. 2.
POSSESSION — Part performance — Statute of Frauds - - - - 887
See Frauds, Statute of. 3.
—— Wrongful—Unregistered bill of sale 809
See Bankruptcy. 3.
POSSESSION MONEY—Execution for sum exceeding £50—Bankruptcy - - 375
See Bankruptcy. 10.
POST-NUPTIAL SETTLEMENT - - 630
See Voluntary Settlement. 2.
POWER—*Will—Appointment—Children or Issue—Exclusive or Distributive Power.*] A testatrix bequeathed a fund to her daughter for life, and after her death to and amongst the other children of the testatrix or their issue, in such parts, shares, and proportions, manner and form, as her said daughter should by deed or will appoint:—*Held* (affirming the decision of the Master of the Rolls), that the daughter's power was exclusive and not distributive merely. *In re* Veale's Trusts 622
POWER OF LEASING — Settled Estates Act—Two estates on distinct trusts - 19
See Settled Estates Act.
PRACTICE—*Adjournment—Costs of Day—Order xxxvi., r.* 21.] When the hearing of an action is adjourned in order to allow parties to be added, the party who applies for the adjournment must pay all the costs incurred by the action having been in the paper for hearing, and not merely a fixed sum for costs of the day. Lydall *v.* Martinson - - - - - 780

2. —— *Administration — Creditors' Action — Indorsement of Writ.*] In a creditor's action for the administration of an intestate's real and personal estate the writ must be indorsed with a claim by Plaintiff "on behalf of himself and all other creditors."—*Worraker* v. *Pryer* (2 Ch. D. 109) followed. *In re* Royle. Fryer *v.* Royle [540

3. —— *Appeal—Dismissal for want of Prosecution—Failure to give Security for Costs—Rules of Court*, 1875, *Order lviii., r.* 15.] Where an Appellant has been ordered to give security for costs and fails to do so, the Respondent is entitled to have the appeal dismissed for want of prosecution after a reasonable time has elapsed, although no time was fixed by the order for completing the security for costs. Vale *v.* Oppert - 633

4. —— *Appeal—Motion to commit—Discretion of Judge.*] The Plaintiffs moved to commit the Defendant for contempt in having sold certain property of the intestate in the cause in disobedience to an order that she should deliver up to the receiver all property of the intestate in her hands, but the notice did not ask for restitution of the property. The Vice-Chancellor refused to commit, and made the costs of the application costs in the action:—*Held*, that an appeal would not lie from this order. Ashworth *v.* Outram (No. 2) - - - - - 943

5. —— *Appeal—Right of Appellant to raise a New Case—Rules of Court*, 1875, *Order lviii., rr.* 2, 5—*Fraudulent Preference.*] An Appellant is not entitled to raise upon his appeal a new case inconsistent with that which he originally raised in the primary Court, even though the evidence taken in that Court supports the new case.—Circumstances amounting to fraudulent preference considered.—The decision of *Bacon*, C.J., affirmed. *Ex parte* Reddish. *In re* Walton - 882

6. —— *Appeal—Time for appealing—Bankruptcy—Rules of Court*, 1875, *Order lviii., rr.* 9, 15—*Bankruptcy Rules*, 1870, *r.* 143.] The time for appealing to the Court of Appeal from decisions of the *London* Court of Bankruptcy is now regulated entirely by the Rules of Court, 1875, and not by the Bankruptcy Rules.—Therefore, where the appeal is from an order actually made, the twenty-one days for appealing runs from the signing, not from the pronouncing, of the order. *Ex parte* Garrard. *In re* Lewer - - 61

7. —— *Appeal—Time for appealing—Bankruptcy Appeal—Rules of Court*, 1875, *Order lvii., r.* 3—*Order lviii., rr.* 2, 3. 9, 15—*Bankruptcy Rules*, 1870, *rr.* 143, 144.] An order, which was a refusal of an application, was made by the *London* Bankruptcy Court on the 10th of March. An appeal was entered with the Registrar of Appeals on the 4th of April, and on the same day notice was served on the Respondent. The Registrar's office had been entirely closed for the Easter Vacation from the 30th of March to the 3rd of April, both inclusive:—*Held*, that, notwithstanding the closing of the office, the notice of appeal might have been served on the Respondent, and that, as it had not been served within twenty-one days, the appeal was too late. *Ex parte* Saffery. *In re* Lambert - - 365

8. —— *Appeal—Time for appealing—Order on Further Consideration and Summons to vary Certificate—Rules of Court*, 1875, *Order lviii., r.* 14.] Goods seized in execution were claimed by the trustees of a settlement made by the debtor. A decree was made in an interpleader suit directing an inquiry whether the settlement was a valid settlement of the goods, and who were entitled to them. The Chief Clerk certified that the settlement was invalid, and the judgment creditor entitled. By an order made on further consideration and on adjourned summons to vary the certificate, the Court declared the settlement

PRACTICE—*continued.*

valid, and ordered the certificate to be varied accordingly, and directed the proceeds of the goods to be paid to the trustees:—*Held*, that the substantial part of this order was an order to vary the certificate, which was an interlocutory order, and that an appeal brought after twenty-one days was too late. WHITE *v.* WITT - - 589

9. —— *Appeal—Vexatious Appeal—Staying Proceedings.*] A Defendant against whom a decree for payment of a sum of money had been made, filed a petition for liquidation. A resolution for liquidation by arrangement was passed and registered, and a trustee appointed. After these proceedings the debtor, who had not obtained his discharge, appealed against the decree. The Plaintiff moved before the Court of Appeal to stay proceedings under the appeal:—*Held*, that an order ought to be made staying the proceedings, as being vexatious. VALE *v.* OPPERT 969

10. —— *Continuance of Action—Bankruptcy of sole Plaintiff—Trustee—Rules of Court*, 1875, *Order* L., *rr.* 1, 2.] Where a sole Plaintiff becomes bankrupt he cannot continue the action. If there are two trustees in bankruptcy, and one refuses to go on, the other may have an order as of course to continue the action and make his co-trustee a Defendant.—The decision of *Malins*, V.C., reversed. JACKSON *v.* NORTH EASTERN RAILWAY COMPANY [844

11. —— *Counter-claim—Damage after Date of Writ—Rules of Court*, 1875, *Order* XIX., *r.* 3.] When a Defendant delivers a counter-claim under Rules of Court, 1875, Order XIX., rule 3, any damages thereby claimed must be limited to the date when the writ was issued. ORIGINAL HARTLEPOOL COLLIERIES COMPANY *v.* GIBB 713

12. —— *Counter-claim — Joinder of Defendants—Inconsistent Alternative Relief — Allegations against Third Party—Rules of Court*, 1875, *Order* XVI., *r.* 3; *Order* XVII., *r.* 1; *Order* XIX., *r.* 10.] In an action for trespass by the Plaintiff, who was a lessee of *W.*, the Defendant, in his defence and counter-claim, to which he made *W.* a party, claimed a right of way by grant from *W.* prior to the Plaintiff's lease, and prayed a declaration of his rights, and an injunction, and damages against the Plaintiff; and in the alternative he prayed an indemnity and damages against *W.*—The Plaintiff amended his claim and made *W.* a Defendant, and prayed an injunction and damages against the original Defendant, and in the alternative damages against *W.*—*W.* demurred both to the counter-claim and the amended claim:—*Held*, by *Hall*, V.C., that the counter-claim was bad in not shewing a cause of action against *W.*, and *W.'s* demurrer was allowed:—*Held*, also, by *Hall*, V.C., that the amended statement of claim was bad, because it prayed inconsistent alternative relief against the original Defendant and *W.*:—But *held*, by the Court of Appeal, that *W.* was properly made a Defendant to the amended claim under Rules of Court, 1875, Order XVI., rule 3, which is not confined to cases in which the alternative relief prayed against one Defendant is consistent with that prayed against the other.—The demurrer to the amended claim was, therefore, overruled. — *Honduras Inter-*

PRACTICE—*continued.*

Oceanic Railway Company v. *Tucker* (2 EX. D. 301) followed CHILD *v.* STENNING - - 695

13. —— *Defence—General Denial—Rules of Court*, 1875, *Order* XIX., *rr.* 17, 20, 22.] The statement of claim in an action for specific performance stated that the predecessor in title of the Plaintiff, by his agent lawfully authorized, signed an agreement with *H.*, the predecessor in title of the Defendant. The statement of defence denied this in words following the words of the statement of claim, and then proceeded to state that the predecessor in title of the Defendant was of unsound mind, and did not lawfully authorize any one as his agent to sign an agreement, and denied that any agreement was made or signed by *H.*, or any person lawfully authorized:—*Held*, that under this statement the Defendant could only enter into evidence to shew the unsoundness of mind, and could not enter into evidence to shew that the agent was not authorized or could not act. BYRD *v.* NUNN - - - 781

14. —— *Inrolment of Decree—Cons. Ord.* XXIII., *rr.* 25, 26.] In July, 1873, a decree declaring *W.* entitled to large estates was affirmed by the Lords Justices. In February, 1877, the unsuccessful party applied for leave to inrol the decree that he might appeal to the House of Lords. In the meantime *W.*, believing himself undisputed owner of the estates, had, in October, 1876, accepted a peerage:—*Held* (reversing the decision of *Bacon*, V.C.), that a party who applies within five years is entitled to inrolment as a matter of right, unless the conduct of the applicant has been such as to make it unreasonable that he should be allowed to inrol—that his merely doing nothing raised no case against him—and that his rights could not be affected by the mere fact that the opposite party had altered his position on the faith of being owner of the estate. COPE *v.* EARL DE LA WARR [666

15. —— *Interrogatories — Leave to deliver Interrogatories — Delay — Rules of Court*, 1875, *Order* XXXI., *r.* 1—*Costs.*] Though great delay had taken place, leave was given to file interrogatories after the close of the pleadings; costs of the application to be costs in the cause. LONDON AND PROVINCIAL MARINE INSURANCE COMPANY *v.* DAVIES - - - - - 775

16. —— *Motion for Order on Admission in the Pleadings—Rules of Court*, 1875, *Order* XL., *r.* 11.] An action having been commenced in November, 1876, to enforce an equitable mortgage with written memorandum dated in February, 1876, the Defendant admitted the mortgage, but alleged, by way of defence, that it was part of the agreement that the Plaintiff should not require a legal mortgage, nor any payment of principal or interest for a year from the time of the advance. The Plaintiff moved for the ordinary foreclosure decree on the admissions in the pleadings; and the motion was refused by Vice-Chancellor *Hall*:—*Held*, on appeal, that the Vice-Chancellor had a discretion as to whether a case was a proper one for making an order on motion under Rules of Court, 1875, Order XL., rule 11; and that the Court of Appeal ought not to interfere with the exercise of that discretion. MELLOR *v.* SIDEBOTTOM - 342

PRACTICE—*continued.*

17. —— *Referee*—"*Scientific Investigation*"—*Fraud*—*Supreme Court of Judicature Act*, 1873, *s.* 57.] An executrix brought an action to set aside for fraud the sale by the Defendant to her testator of about 130 pictures for prices amounting in the whole to £50,000. The defence denied the fraud. The Plaintiff moved to have the questions referred to a special referee under the *Judicature Act*, 1873, s. 57, on the ground that the examination of the pictures required a scientific investigation, which could not conveniently be had before a jury. The Defendant opposed and stated his wish for a trial by a jury:—*Held* (affirming the decision of *Hall*, V.C.), that the case was not within the purview of sect. 57, so as to give jurisdiction, without the consent of all parties, to send it to a referee; and that if there had been jurisdiction, still as the case involved questions of fraud seriously affecting the character and fortune of the Defendant, it ought not, against his will, to be tried otherwise than in open Court. Leigh *v.* Brooks - - - - - 592

18. —— *Service*—*Notice of Motion for Attachment*—*Service on Solicitor*—*Rules of Court*, 1875, *Order* xliv., *r.* 2.] Where a notice of motion is given for a writ of attachment to issue against a Defendant under Rules of Court, 1875, Order xliv., rule 2, service of such notice on the solicitors on the record of the Defendant is sufficient service. Browning *v.* Sabin - - - - 511

19. —— *Service out of the Jurisdiction*—*Rules of Court*, 1875, *Order* xi., *rr.* 1, 1*a*, 3.] The evidence required by Rules of Court, 1875, Order xi., rule 3, of the grounds on which an application for service of a writ out of the jurisdiction is applied for must be evidence to prove that there is a cause of action, and that such cause of action arose within the jurisdiction; but the Court will not allow such evidence to be controverted, or go into the merits of the case.—A company registered in *England* for working a mine in *Australia* brought an action against persons connected with the formation of the company, making a *primâ facie* case for relief in respect of acts within the jurisdiction.—The Court refused to make an order under Order xi., rule 1, for service of the writ in *Australia* upon one of the Defendants, who was a British subject, until the Plaintiffs produced an affidavit by their secretary that he was informed and believed that there was a good cause of action within the jurisdiction. Great Australian Gold Mining Company *v.* Martin - - 1

20. —— *Summons in Winding-up*—*Companies Act*, 1862, *ss.* 100, 165—*Service out of the Jurisdiction*—*Rules of Court*, 1875, *Order* xi., *rr.* 1, 4.] Leave was given to serve out of the jurisdiction a summons taken out by the liquidator of a company under the *Companies Act*, 1862, ss. 100, 165, and the parties were allowed a time for appearance as upon service of a bill or suit. *In re* British Imperial Corporation - - - 749

21. —— *Transfer from County Court*—*Costs.*] Where a Plaintiff commences a suit in the County Court, which at the hearing is transferred to the High Court of Justice because the subject-matter exceeds in amount £500, the Plaintiff, though he succeeds and obtains the general costs of the suit, must pay the costs of the hearing before the County Court. Ward *v.* Wyld - - - 779

22. —— *Trial by Jury*—*Right to require a Jury*—*Several Defendants*—*Rules of Court*, 1875, *Order* xxxvi., *rr.* 3, 26.] Where there are two or more Defendants to an action or suit, one of them alone, in opposition to or without the concurrence of the others, is not entitled, under Rules of Court, 1875, Order xxxvi., rule 3, to require the action to be tried before a jury.—Order xxxvi., rule 26, gives the Court a discretion in all cases of fraud, or such as raise questions which, before the *Judicature Act* came into force, were properly within the jurisdiction of the Court of Chancery, to order them to be tried without a jury, and the Court is not bound in such a case to allow a jury at the instance of a Defendant. Back *v.* Hay - 235

23. —— *Trial by Jury*—*Discretion of Judge*—*Rules of Court*, 1875, *Order* xxxvi., *rr.* 3, 26.] The Plaintiff filed a bill in the Court of Chancery before the *Judicature Act* for specific performance of a contract. He then amended his bill, claiming damages against one of the Defendants for alleged misrepresentation of authority, and set his cause down at the Associates' Office for trial by Judge and jury:—*Held*, that the Plaintiff had no absolute right in such a case to a trial by jury; and directions were given under Rules of Court, 1875, Order xxxvi., rule 26, that the issues of law and fact should be tried in this Court without a jury. Pilley *v.* Baylis - - - - 241

24. —— *Trial by Jury*—*Rules of Court*, 1875, *Order* xxxvi., *rr.* 3, 26.] In an action for a mandatory injunction to restrain the Defendant from permitting a building to remain so as to obstruct the Plaintiffs' ancient lights, the Defendant having given notice under Rules of Court, 1875, Order xxxvi., rule 3, for the trial of issues of fact by jury, on a motion by the Plaintiffs that the action might be tried by a Judge without a jury:—*Held*, that the case did not come within rule 26 of Order xxxvi.; and that the Defendant was entitled to have the action tried according to his notice.—The class of cases to which Order xxxvi., rule 26, is intended to apply, considered. Bordier *v.* Burrell - - - - 512

25. —— *Trial of Action*—*Questions of Law and Fact*—*Rules of Court*, 1875, *Order* xxxiv., *r.* 2—*Costs* — *Higher Scale*—*Rules of Court*, 1875 (*Additional*), *Order* vi., *rr.* 2, 3.] Order xxxiv., rule 2 (Rules of Court, 1875)—under which, in any action involving questions both of law and of fact, the Court may direct the question of law to be raised for its opinion before trying the question of fact—has reference only to a case where the action has not yet come on for trial; but, by analogy to that rule, the Court will, at the trial of an action involving questions both of law and of fact, decide the question of law first, if it shall appear that the decision of such question may render it unnecessary to try the question of fact.—In an action on a bill of exchange properly brought in the Chancery Division, costs may be allowed on the higher scale: Additional Rules of Court (12th August, 1875), Order vi., rr. 2, 3. Pooley *v.* Driver - - - - 458

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PUBLIC HEALTH ACT, 1875 (38 & 39 *Vict. c.* 55), *s.* 264—*Notice of Action—Action for Injunction.*] Where the principal object of an action against a local board of health is an injunction to restrain an immediate injury, it is not necessary to give a month's notice of the cause of action under the 264th section of the *Public Health Act*, 1875. And it makes no difference that damages are claimed by way of subsidiary relief. — The decision of *Malins*, V.C., reversed. Flower *v.* Local Board of Low Leyton - - - - 347

2. —— (38 & 39 *Vict. c.* 55), *s.* 16—*Sewer—Power to carry Sewer over Lands.*] By the *Public Health Act*, 1875, s. 16, a local authority is empowered to carry any sewer "into, through, or under" any lands within its district, and the Act provides for compensation to all persons sustaining damage by reason of the exercise of the powers of the Act in relation to any matters as to which they are not themselves in default. A local board under this Act proceeded to carry a sewer across the Plaintiff's pleasure grounds on such a level that the bottom of the sewer would be only slightly below the surface, and a permanent embankment about six feet high would be made:—*Held* (by the Master of the Rolls and by the Court of Appeal), that they were authorized so to do, for that the Act did not confine them to carrying a sewer underground. Roderick *v.* Aston Local Board [328

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RIPARIAN OWNER—*Navigable River—Access to Wharf or Dock—Obstruction—Injunction*] A navigable river is a public highway, navigable by all Her Majesty's subjects in a reasonable manner and for a reasonable purpose. Accordingly a riparian owner has a right to moor a vessel of ordinary size alongside his wharf for the purpose of loading or unloading, at reasonable times and for a reasonable time; and the Court will restrain by injunction the owner of adjoining premises from interfering with the access of such vessel, even though the vessel may overlap his own premises; though such vessel would not be allowed to interfere with the proper right of access to the neighbouring premises if used as a wharf, nor to the free entrance to or exit from such premises, if used as a dock, by other vessels. Original Hartlepool Collieries Company *v.* Gibb 713

2. —— *Water Rights—Prescription — Pollution of Stream—Injunction—Injury—Damages—21 & 22 Vict. c. 27, s. 2.*] The distinction explained between an obstruction to ancient lights and an interference with the water rights of a riparian proprietor with reference to the question whether damages should be awarded in lieu of an injunction.—The difference between "injury" and "damage" illustrated. Pennington *v.* Brinsop Hall Coal Company - - - 769

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See Practice. 25.

SALE OF GOODS—*Dock Warrant—Delivery Order—Purchase by Broker for Undisclosed Principal—Suretyship—Lien of Unpaid Vendor—Usage of Dry Goods Market.*] According to the usage of the *London Dry Goods Market*, a broker who contracts for the sale of goods without disclosing his principals is personally liable in default of his principal.—On the 3rd of March certain goods belonging to Messrs. *C.*, lying at the *St. Katharine Dock*, in the custody of the *Docks Company*, were bought by *D.*, as broker for buyers and sellers, for *B. & Co.*, without disclosing the names of his principals, and *D.* indorsed to them the delivery order he had obtained from the sellers, on the representation of *B. & Co.* that the goods were wanted for immediate shipment. They, however, pledged their interest in the goods to the Plaintiffs, and indorsed the order to them. On the prompt day, the 18th of March, the Plaintiffs' clerk lodged the order at the *London* office of the *Docks Company*, with this memorandum, "Hold within to our order, and have warrants made out as soon as possible." He was told that the warrants would be ready with the goods on the 20th of March. Three hours later a messenger from the office reached the warrant office at the *Dock House* with a notice that the order had been lodged. Meanwhile *B. & Co.* had stopped payment, and *D.* being so informed, and having no notice of the Plaintiffs' title, on the same day paid Messrs. *C.* for the goods, and through a clerk, who reached the *Dock House* before the messenger had arrived, obtained at the warrant office a warrant for the goods in the name of Messrs. *C.*, who indorsed the same to *D.*, and gave him a second delivery order. The first delivery order was returned to the Plaintiffs by the *Docks Company*, who refused to act upon it.—In an action by the Plaintiffs, claiming, as against the *Docks Company*, Messrs. *C.*, and *D.*, to be entitled to the goods:—*Held*, that *D.* was the surety and *B. & Co.* the principal debtors; that, in the circumstances of the case, the unpaid vendors' lien had

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passed to *D.*; that the title to the goods was in *D.*; and that Messrs. *C.* were not necessary parties to the suit. Imperial Bank *v.* London and St. Katharine Docks Company - - 195

2. —— *Stoppage in Transitu—End of Transit—Constructive Delivery—Agreement for particular Destination of Goods—Bill of Sale—"Other Assurances of Personal Chattels"—Bills of Sale Act*, 1854 (17 & 18 *Vict. c.* 36), *s.* 7.] An agreement was entered into between *L.*, a merchant in *London*, and *W.*, a manufacturer in *Yorkshire*, that *W.* should from time to time supply *L.* with goods, *W.* drawing upon *L.*, and *L.* accepting, bills of exchange for the invoice price of the goods. *L.* was to ship the goods to *R.* at *Shanghai*, for sale on *L.'s* account. On receipt of the bills of lading *L.* was to send them to *R.*, to whose order they were to be made out. *W.* was to have a lien upon the bills of lading, and each shipment of goods in transit outwards, or in the hands of the consignee or any other persons, which lien, however, was to extend only to the particular shipment, and was to cease when the bills of exchange given for that shipment had been paid. No notice of this agreement was given to *R.* In pursuance of the agreement *L.* ordered a parcel of goods of *W.* The goods were packed by *W.'s* packer, who forwarded them by railway to *London* in bales marked for *Shanghai*, and addressed to a ship called the *Gordon Castle* designated by *L.*, which was loading in the *West India Docks* for *Shanghai*. The freight to *London* was paid by *W.* The packer in advising *L.* of the despatch of the goods, told him that they were "at his disposal." *L.* accepted a six months' bill of exchange drawn upon him by *W.* for the invoice price. The railway company, in advising *L.* of the arrival of the goods at their *Poplar Docks Station*, told him that they remained at his order and were held by the company as warehousemen at his risk, but added, "will be sent to the *Gordon Castle*." The goods were shipped on board that vessel. The bills of lading were by *L.'s* direction made out to the order of himself or assigns, but they were never delivered to him by the shipowners, inasmuch as he did not pay the freight. The ship sailed for *Shanghai* with the goods on board. A few days previously *L.* had stopped payment, and shortly after she had sailed he committed an act of bankruptcy, upon which he was adjudicated a bankrupt. The bills of lading were still in the possession of the shipowners in *London*, of whom they were claimed by *W.* and by the trustee in the bankruptcy. It was arranged that the goods should be sold by the agent of the shipowners at *Shanghai*, and the proceeds of sale paid to the person who should be entitled to them:—*Held*, that the agreement did not deprive *W.* of the right to stop the goods *in transitu*; that the transit was not ended till the goods arrived at *Shanghai*, and that the demand by *W.* of the bills of lading from the shipowners was an effectual stoppage *in transitu*. Consequently, that *W.* was entitled to have the bill of exchange satisfied out of the proceeds of sale:—*Held*, also, that *W.* could have obtained an injunction to restrain *L.* from sending the goods to any other destination than *Shanghai*:—*Held*, also, that the agreement was not an instrument which

SALE OF GOODS—*continued.*

required registration under the *Bills of Sale Act*. *Ex parte* Watson. *In re* Love - - 35

3. —— *Vendor's Lien—Stoppage in Transitu—Iron Warrants, Claim by Holders of—Usage of Iron Trade—Warehoused Goods—Transit—Apportionable Contract.*] By the usage of the iron trade warrants for goods "deliverable (f. o. b.) to *A. B.*, or their assigns, by indorsement hereon." are considered to pass to the holders for value free from any vendor's lien.—The *P. B. Company*, manufacturers of steel rails, contracted with *S. & Co.*, iron merchants, for the sale of a quantity of rails to be rolled at their works, and to be delivered at intervals, payment to be made as to three-fifths at three days' sight, and as to two-fifths by buyers' acceptances at four months. On the completion of each portion of goods a warrant for the same in the above form was sent to *S. & Co.* with an invoice and drafts for the purchase-money, and the goods referred to in the warrants were stacked at the works. In the meantime *S. & Co.* pledged the several warrants, and indorsed the same to the Plaintiffs. Before the contract was completed, when only part of the goods were paid for, *S. & Co.* became bankrupt, and their acceptances were dishonoured. At that time part of the goods had been dispatched in waggons sent by order of *S. & Co.*, and were stored in a railway company's warehouse, addressed to the agents of *S. & Co.*, and part remained stacked at the works:—*Held*, that, by the usage of the iron trade, as well as by the intention of the parties as shewn by their course of dealing, the Plaintiffs, as holders for value of the warrants, were entitled to the goods free from any vendor's lien:—*Held*, also, that even had the vendors been able to claim a lien on the undelivered goods, the transit was at an end as regarded those stored in the warehouse, and their right was gone:—*Held*, also, that the contract was apportionable, and that the vendors could not in any event have claimed any lien on that portion of the goods which had been fully paid for. Merchant Banking Company of London *v.* Phœnix Bessemer Steel Company - 205

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SETTLED ESTATES ACT, 1856 (19 & 20 *Vict. c.* 120), *s.* 10—*Power of Leasing—Mining Lease—Lease by Trustees of Two Estates held on Distinct Trusts—Specific Performance.*] Two contiguous estates were devised to trustees upon trust for distinct *cestuis que trust*. By an order made

SETTLED ESTATES ACT, 1856—*continued.*
under the *Settled Estates Act*, power was given to the trustees to grant mining leases in conformity with and subject to the provisions of the *Settled Estates Act*; such leases to be granted with the consent of the respective tenants for life if of age. The trustees and the two tenants for life entered into an agreement with the Defendants to grant them a mining lease of the two estates for forty years (or fifty years if the Court should consent); both estates were intended to be comprised in the same lease, and the rents and royalties were to be reserved as if they were one estate, and there was to be one shaft for working the minerals under both estates; and it was also agreed that the lessors should be at liberty to apply to the Court under the *Settled Estates Act* for further powers of leasing:—*Held* (affirming the decision of *Hall*, V.C.), that the trustees had no power to grant such a lease of the two estates, and specific performance of the agreement was refused.—Whether in any case a lease by trustees by one demise of two estates held upon distinct trusts would not be a breach of trust—*Quære.* TOLSON *v.* SHEARD - - - - 19

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See COMPANY. 11.

SOLICITOR—*Bill of Costs—Retainer without special Instructions—Journey to collect Information and conduct Negotiations—Solicitor of Public Company.*] A solicitor had a retainer to act generally for a company, and also a special retainer to conduct a Chancery suit on behalf of the company. Being employed by another client to go to *America*, he collected information on behalf of the company in furtherance of their suit, but without special instructions from the company to do so. On his return to *England* he reported to the company what he had done, and they made use of the information he had obtained.—He afterwards took three journeys to *Paris* to conduct negotiations for a compromise of the same suit, without instructions from the company, but with the knowledge of some of the directors, and on two of them he was accompanied by the chairman:—*Held*, by the Court of Appeal (reversing the decision of the Master of the Rolls), that, under the special circumstances of the case, the solicitor was entitled to charge the company for his professional services in *America*, and also for his professional services and expenses on his journeys to *Paris*.—Observations on the rule that a solicitor must not undertake journeys on behalf of his client without special instructions. *In re* SNELL (A SOLICITOR) - - - - 815

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SURRENDER OF SHARES—Power to accept—Subscriber of memorandum - 525
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TENANT FOR LIFE—Custody of deeds - 221
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—— Composition with creditors—Objecting to proof - - - - - 345
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See Vendor and Purchaser. 2.
TITHE COMMUTATION MAP—Evidence - 709
See Evidence. 2.
TITLE-DEEDS—*Custody of Deeds—Settled Estate—Tenant for Life and Remainderman.*] A legal tenant for life of freeholds is entitled to the custody of the title-deeds, and the Court will not interfere as between a tenant for life and remainderman, except where there is danger to the safety of the deeds if left in the hands of the tenant for life, or where the Court requires the deeds for the purpose of carrying out trusts relating to the property.—On an application by a tenant for life in remainder of settled estates for the title-deeds to be deposited in Court:—*Held*, that the tenant for life in possession was entitled to their custody.—*Warren* v. *Rudall* (1 J. & H. 1) commented on. Leathes *v.* Leathes 221
TITLE TO LAND—Evidence—Tithe commutation map - - - - - 709
See Evidence. 2.
TOMB—Repair of - - - - 735
See Charity. 1.
TRADE—Covenant in restraint of - 549, 974
See Covenant.
—— Married woman - - - - 923
See Husband and Wife. 1.
TRADE-MARK—*Combination—Words or Devices indicating Quality—Device common to the Trade—Trade Marks Registration Act*, 1875 (38 & 39 *Vict. c.* 91)—*Trade Marks Registration Amendment Act*, 1876 (39 & 40 *Vict. c.* 33).] The applicants, who were iron manufacturers, had for a long period before the passing of the *Trade Marks Registration Act*, 1875, been in the habit of using as trade-marks the letters B B H, which were the initials of the firm, and also the same marks coupled with symbols or words common to the trade, denoting the quality of the iron:—*Held*, by *Malins*, V.C., that every mark, or combination of marks or words used as a trade-mark before the passing of the *Trade Marks Registration Act*,

TRADE-MARK—*continued.*

1875, which would have entitled the proprietor to maintain a suit for infringement against any person imitating it, may be registered as a trade-mark under the Act, and a trader is entitled to register a series of such marks which only differ from each other by combining in different modes a mark common to all of them and peculiar to the trader, with words merely indicative of the quality of the goods marked or symbols common to the trade, a note being in such a case entered in the register specifying the portions of the combination as to which no exclusive right is claimed. —*Held*, by the Court of Appeal, that the proper mode of registration was to register the trade-mark B B H to be used either alone or with any device or words signifying the quality of the iron. *In re* Barrows' Trade-marks - - 353

—— Expired patent - - - - 850
See Patent. 1.

TRANSFER OF ACTION—From County Court
See Practice. 21. [779

TRANSFER OF COMPANY—Distribution of consideration - - - - 894
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TRANSIT—Termination of - - - 205
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TRESPASS—Action by reversioner - 750
See Copyhold.

TRIAL BY JURY—Right to 235, 241, 512
See Practice. 22, 23, 24.

TRIAL OF ACTION—Questions of law and fact
See Practice. 25. [458

TRUST—Failure of—Charge on real estate 746
See Conversion.

TRUST ESTATES—Devise of - - 504
See Will. 5.

TRUSTEE—*Assignment—Notice—Priority—Trustee himself an Assignee—Practice—Time for appealing—Bankruptcy Appeal—Rules of Court*, 1875, *Order* LVIII., *rr.* 9, 15—*Bankruptcy Rules*, 1870, *r.* 143.] *W.* and *A.* were appointed joint receivers in a partnership suit, and were ordered (after payment of costs) to pay the residue of the moneys received by them to the partners according to their respective rights. *L.*, one of the partners, afterwards assigned his share of the moneys to *W.*, in consideration of advances made by him. After this *L.* signed an order to *W.*, requesting him "to pay the balance of money due to me" to *G.* *W.* accepted this order in writing, undertaking thereby to pay "the balance due to you" to *G.*:—*Held*, upon the construction of this acceptance, and upon the evidence, that "the balance" intended was the balance remaining after satisfying *W.'s* own claim.—Decision of *Bacon*, C.J., affirmed. *Ex parte* Garrard. *In re* Lewer [61

2. —— *Breach of Trust—Liability of co-Trustee—Sale—Deficiency.*] Two trustees advanced to a builder money on mortgage of land and houses thereon. The land had belonged to the Defendant, one of the trustees, and part of the money advanced was applied by the builder in payment of the price of the land and of other money due by him to the Defendant. The other trustee filed a bill against the Defendant, alleging

TRUSTEE—*continued.*

that the security was insufficient, and asking that the security should be realized, and that the Defendant should make good any deficiency:—*Held*, that under such circumstances one trustee had no equity to make the other trustee primarily liable: and—*Held*, that the Court would not direct a sale in the absence of the *cestuis que trust*, and merely to ascertain the deficiency, if any. Butler *v.* Butler - - - - 554

—— Appointment of—Trustee Act - 982
See Trustee Acts.

—— Liability of - - - - 229
See Trustee Relief Act.

—— Power of leasing—Two estates on distinct trusts - - - - 19
See Settled Estates Act.

TRUSTEE ACTS—*Trustee Act*, 1850, *s.* 3—*Appointment of new Trustee in place of Lunatic Trustee—Vesting Order in continuing and new Trustees—Order in Chancery Division and in Lunacy.*] Where one of several trustees is a lunatic and it is desired to appoint a new trustee in his place, the petition must be intituled in the Chancery Division as well as in Lunacy, otherwise the vesting order will sever the joint tenancy. *In re* Pearson (a Lunatic) - - - 982

TRUSTEE IN BANKRUPTCY—Title of—Relation back - - - - - 27
See Bankruptcy. 2.

TRUSTEE IN LIQUIDATION—Power of - 145
See Bankruptcy. 12.

TRUSTEE RELIEF ACT—*Liability of Trustees—Costs.*] A married woman having, under a settlement, a general power of appointment by will, appointed the fund, in pursuance of the power, to be divided among five persons, and appointed executors. The trustees of the settlement paid the money into Court under the *Trustees Relief Act*, and the *cestuis que trust* presented a petition for payment out, establishing their right to the fund by evidence:—*Held*, that the trustees should have paid the fund over to the executors of the will for distribution, and they were ordered to pay the costs; but, as the executors were the proper persons to present the petition, the trustees were exempted from payment of so much of the costs as were occasioned by the production of evidence by the *cestuis que trust*. *In re* Hoskin's Trusts - - - - - 229

VENDOR—Description of - - 648, 660
See Frauds, Statute of. 1, 2.

—— Lien—Sale of goods - - 195, 205
See Sale of Goods. 1, 3.

VENDOR AND PURCHASER—*Conditions of Sale—Sale subject to Quit Rents—Form of Conveyance.*] Trustees for sale who sold under a condition that "the property is sold and will be conveyed subject to all free rents, quit rents, and incidents of tenure, and to all rights of way, water, and other easements, if any . . . . without any obligation on the vendors to define any such rights or claims":—*Held* (affirming the decision of *Bacon*, V.C.), entitled to have a saving in general terms inserted in the habendum of the conveyance, although it was not shewn or asserted that

VENDOR AND PURCHASER—*continued.*
the property was subject to any of the liabilities so specified. Gale *v.* Squier - - - 625

2. —— *Rescission of Agreement relating to Land—Action for Damages for Breach of Contract for Sale of Land—Measure of Damages—Re-sale by the Vendor—Time of the Essence of the Contract—Sale by Trustees—Proper Valuation of Property.*] By a contract in writing, dated the 3rd of September, 1873, *E.* agreed to purchase certain freehold farms from *N.* for £33,000, subject to the title being accepted by his solicitor. The purchase-money was to be paid on the 29th of September, 1873, on which day it was presumed that the contract would be completed and possession given; but in the event of the purchase not being completed on that day, the purchaser was to pay interest up to such reasonable time as might be agreed upon by his solicitor. When the title was produced it appeared that *N.* was not the legal owner of the land, but had agreed to purchase the same from the trustees of a settlement for £21,000, by a contract which was not completed till after the 29th of September, 1873. *E.* took the objection that it appeared on the face of the title that the trustees had sold the estate to *N.* for a grossly inadequate price. *N.* proved that the trustees had had a fair valuation made of the land before offering it to him, but, notwithstanding, on the 29th of September, *E.* wrote to *N.* stating that he considered the objection fatal, and that he rescinded the contract. *N.* then obtained a conveyance from the trustees, and re-sold the estate for £25,000 to a stranger, and in August, 1875, brought an action against *E.* to recover the difference of price by way of damages for breach of the contract. *E.* filed a bill against *N.* to restrain the action, and to obtain a declaration that the contract was rescinded:—*Held*, by *Bacon*, V.C., first, that the bill to obtain a declaration of the rescission of the contract could not be maintained, and that *E.'s* bill must therefore be dismissed:—Secondly, that the apparently inadequate price at which the estate was sold by the trustees was not a fatal objection to the title, and, therefore, that *E.* had no right to rescind the contract:—Thirdly, that *N.* had a right to re-sell the estate and claim the difference by way of damages against *E.*, there being no distinction in this respect between a sale of chattels and of land.—*Held*, on appeal (the objection not having been urged in the Court below), that, on the construction of the agreement, it was to be completed on the 29th of September, 1873, and that, the action having been commenced before the *Judicature Act* came into operation, time was of the essence of the contract; and that, the vendor not being on that day in a position to make a good title and execute a conveyance, he could not sustain an action for damages. Noble *v.* Edwardes. Edwardes *v.* Noble - - 378

3. —— *Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 9—*Evidence.*] The purchaser of a farm, consisting in part of 400 acres of heath land, took the objection that a title was not shewn to the soil of the heath land, but only to rights of pasturage over it. The vendors took out a summons under the *Vendor and Purchaser Act*, 1874, asking that it might be declared that the purchaser's objections and requisitions were sufficiently answered. Affidavits were filed on both sides, and the deponents were cross-examined. The Master of the Rolls rejected the affidavits and cross-examination, on the ground that evidence by affidavit upon requisitions as to title under the Act ought not to be given unless required by the Judge:—*Held*, by the Court of Appeal, that the evidence ought to have been admitted, for that, on a proceeding under the *Vendor and Purchaser Act*, 1874, the parties are in the same position as they would have been under a reference as to title in a suit for specific performance. *In re* Burroughs, Lynn, and Sexton - - 601

—— Evidence - - - - 709
See Evidence. 2.

—— Statute of Frauds - - 648, 660
See Frauds, Statute of. 1, 2.

VEXATIOUS APPEAL - - - 969
See Practice. 9.

VOLUNTARY SETTLEMENT — *Consideration — Assignment of Leaseholds—Subsequent Purchaser for Value—Settlement on Second Marriage—Limitation in Favour of Son by former Marriage—27 Eliz. c.* 4.] A widower, on his second marriage, made a settlement, in which he assigned some leasehold property to trustees, one of whom was his son by a former marriage, upon trust for himself for life, and after his death for his said son. He afterwards contracted to sell the leasehold property to the Plaintiff:—*Held*, that the settlement of the leasehold property on the son was not a voluntary conveyance under the 27 Eliz. c. 4, on the ground that the assignment of leasehold property to which liability is attached is, in itself, a conveyance for valuable consideration.—Whether the settlement was also for valuable consideration as regarded the son, on the ground that the consideration of the second marriage extended to him—*Quære.*—The decision of *Hall*, V.C., reversed. Price *v.* Jenkins - 619

2. —— *Husband and Wife — Post-nuptial Settlement—27 Eliz. c.* 4*—Precatory Trust—Valuable Consideration.*] Real estate was devised to a single woman with a declaration of a wish that if she should marry she would before marriage settle it to her separate use for life and to such uses as she should by will appoint. She married without a settlement, and afterwards, by an acknowledged deed expressed to be made for giving effect to the testator's wish, the husband and wife conveyed the land to trustees during the life of the wife upon trust for her for her separate use without power of anticipation, and after her death to the use of the husband for life, with remainder to their children as therein mentioned. Subsequently the husband and wife mortgaged the property without notice of the settlement:—*Held* (affirming the decision of *Bacon*, V.C.), that the settlement was for valuable consideration, and not void as against the mortgagee under statute 27 Eliz. c. 4. Teasdale *v.* Braithwaite - 630

WAREHOUSE—Delivery order—Iron trade 205
See Sale of Goods. 3.

WASTE OF MANOR—Encroachment - 750
See Copyhold.

WATER RIGHTS - - - - 769
See Riparian Owner. 2.

WAY—*Award under Inclosure Act—Road for Agricultural Purposes.*] By an award under an Inclosure Act, it was directed that certain of the allottees and the owners for the time being of their allotments should for ever thereafter have a way-right and liberty of passage for themselves, their respective tenants and farmers, as well on foot as on horseback, and with their carts and carriages, and to lead and drive their horses, oxen, and other cattle from the common highway over the east end of the allotments to their respective allotments, doing as little damage to the soil or the corn, grass, or herbage, as might be, and in case the allottees should "street out" the way, that the same should always remain eleven yards wide, but the road was not to be a way of right for any other persons whomsoever than as aforesaid. The owner of one of the allotments commenced building houses upon it, and began to lay down a metalled road where there had only been an ordinary cart-tract over the adjoining allotments:—*Held* (affirming the decision of *Malins*, V.C.), that the allottees were not confined to the use of the road for agricultural purposes only, but were entitled to construct a substantial roadway suitable for the purposes to which the land was now in course of being applied. Newcomen *v.* Coulson - - 133

2. —— *Railway Company—Extinguishment of Rights of Way—Private Way.*] The Plaintiffs had been entitled from 1855 to a carriage-way to property of theirs over a railway by a level crossing. By an Act of Parliament obtained by the company in 1875, reciting that it was expedient that the rights of way in respect of certain footways which crossed the railway on the level should be extinguished, it was enacted that all rights of way in, over, or affecting the footways numbered 2, 4, 5, 6, and 7 on the deposited plans should be extinguished. No provision for compensation was made. The roadway in question was numbered 5 on the deposited plans, and was thereon marked "roadway and footway," the others being marked simply "footway":—*Held* (affirming the decision of *Malins*, V.C.), that upon the true construction of the Act, it did not interfere with private rights of way, but only with public rights of footway, and that an injunction restraining the railway company from obstructing the way had been rightly granted. Wells *v.* London, Tilbury, and Southend Railway Company - - 126

WHARF—Access to—Obstruction - - 713
See Riparian Owner. 1.

WHARFINGERS' POLICIES - - 569
See Insurance.

WIFE'S CHOSE IN ACTION—Reduction into possession - - - 516
See Husband and Wife. 2.

WILL—*Construction—Bequest of Debt due from Legatee—Release—Joint and Separate Debts.*] A testator bequeathed "all debts which shall be due to me by *B.* at the time of my decease unto *B.*, his executors, administrators, and assigns, for his and their own use and benefit." And the testator directed his trustees, "to deliver up to *B.*, his executors, administrators, or assigns, all

WILL—*continued.*

securities whatever which I shall hold at the time of my decease for securing the repayment of such debts, and that the trustees shall, when required by *B.*, his executors, administrators, or assigns, give and execute to him or them an effectual release from the payment of all such debts." At the date of the will and at the time of the testator's death there was due to him from *B.* a sum of £50, for which *B.* had given the testator his promissory note. There was also due to the testator from a partnership firm consisting of *B.* & *G.* a sum of £300, for which *B.* & *G.* had given the testator their joint promissory note, and a sum of £2300, for which *B.* & *G.* had given him their joint and several promissory notes:—*Held*, that, there being a private debt of *B.* which satisfied the words of the bequest and release, those words could not be construed as including the partnership debts.—Decision of *Bacon*, C.J., reversed. *Ex parte* Kirk. *In re* Bennett - - 800

2. —— *Construction—Debt—Mistake.*] A testator directed his debts to be paid, "including a debt of £300 owing from me to my daughter." He owed his daughter £150 only:—*Held*, that she was not entitled to receive more than the £150. *Whitfield* v. *Clemment* (1 Mer, 402) distinguished. Wilson *v.* Morley - - 776

3. —— *Construction—Conversion—Whether out and out—Bequest after Death of Wife—Life Estate by Implication—Descendants—Parent's Share—Word—"Payable"—Thellusson Act* (39 & 40 *Geo.* 3, *c.* 98)—*Void Accumulation—Intestacy—Costs.*] A testator who died in June, 1837, gave to trustees the whole of his property in trust for the payment of his debts, with full power to sell all or any part of his estates or to demise the same; and directed them out of the moneys produced or out of the rents to pay the testamentary expenses and debts, and then gave certain legacies, and directed that after the death of his wife and after the payment of all debts and legacies the whole residue of all his remaining property should be divided into twelve portions, and be given "to the children" of his late aunts "equally among them, the descendants, if any, of those who might have died being entitled to the benefit which their deceased parent would have received had he or she been then alive . . . . and should there be no children or lawful descendants of any of his aunts remaining at the time the bequests should become payable, then the portions" were to fall into the residuary fund. The testator declared that it should not be incumbent on his executors to pay the legacies sooner than two years after his decease; nor to divide the residue amongst his relatives until two years after the death of his wife, and made provision for payment of his wife's jointure. The wife died in 1876:—*Held*, that the children and grandchildren of the aunts only were entitled to the benefit of the gift; and that the wife did not take an estate for life by implication. Ralph *v.* Carrick - - - 984

4. —— *Construction—General Bequest—Articles specifically enumerated—Ejusdem Generis.*] A testatrix made her will in these words: "I *S. G.*, do bequeath to *A. K. G.* all that I have power over, namely, plate, linen, china, pictures, jewellery, lace, the half of all valued to be given

WILL—*continued.*

to *H. G.* The servants in the house who have been a year with me to receive £10, and clothes divided among them, also all kitchen utensils." The testatrix had considerable personal estate :—*Held* (affirming the decision of *Malins.* V.C.), that the whole personal estate passed by the will. KING *v.* GEORGE - - - - 627

5. —— *Construction—General Devise—Charge of Debts and Legacies—Trust Estates.*] A testator gave various pecuniary legacies, and all the rest and residue of his estate, real and personal, he gave, devised, and bequeathed to his wife, her heirs, executors, administrators, and assigns, absolutely :—*Held*, that the legacies were charged on the real estate, and therefore that the general devise did not pass property of which the testator was seised in fee as trustee.—Trust estates will not pass under a general devise where there is a charge of debts, or of legacies, or of debts and legacies.—*In re Brown and Sibly's Contract* (3 Ch. D. 156) dissented from. *In re* BELLIS'S TRUSTS [504

6. —— *Construction—Gift to A. for Life, with Remainder to her unborn Children, and "Children's Children"—Remoteness—Estate Tail—Cy-près—Practice—Jurisdiction as to future Rights.*] A testator directed that on his daughter attaining twenty-one, his trustees should pay the income of his freeholds and copyholds to her during her life; "and should she live to become marriageable, and die leaving a child or children behind her born in lawful wedlock," then that his trustees should apply the income to the support and maintenance of "such child," if only one, or, if more than one, equally among "such children during their lives, and in like manner to their children and children's children, each family having the father or mother's share; or should his said daughter die previous to being married, or after marriage leaving no child or children behind her born in lawful wedlock, or, if leaving children as afore-described, upon them or their families becoming extinct," then over.—The testator's daughter survived him and attained twenty-one, she being his sole heiress-at-law and a spinster.—The following questions then arose: First, whether the gift over after her life estate was not void for remoteness; secondly, if not, whether she was not entitled to an immediate estate tail in possession; and thirdly, whether, admitting that she took an estate for life, and that her children (if any) took life estates in remainder, she did not take an estate tail in remainder expectant on those life estates :—*Held*, first, that the gift over after the daughter's life estate was not void for remoteness; secondly, that she did not take an estate tail in possession; but that the third question could not be decided at present, as it related to future rights.—*Hayes* v. *Hayes* (4 Russ. 311) held not to be law.—*Forsbrook* v. *Forsbrook* (Law Rep. 3 Ch. 93) discussed.—The *cy-près* doctrine considered and explained. HAMPTON *v.* HOLMAN [183

7. —— *Construction—Inconsistent Clauses—Omission supplied.*] A testator directed his trustees to convert his property and invest the proceeds, and then went on: "And I declare that the said trustees or trustee may vary the said

WILL—*continued.*

stocks, funds, shares, and securities at their or his discretion, and shall pay the moneys and the investment for the time being representing the same to my said wife during her life upon trust for all my children or any child who being sons or a son shall attain the age of twenty-one years, or being daughters or a daughter shall attain that age or marry, and if more than one in equal shares." He then empowered the trustees, after the death of his wife or previously by her direction, to raise any sums not exceeding half the expectant share of any child for his or her advancement, and to apply the income of each child's expectant share for maintenance after the death of his wife; and if no child, being a son, should attain twenty-one, or being a daughter, attain that age or marry, the fund was given over after the death of the widow :—*Held* (reversing the decision of the Master of the Rolls), that the widow took a beneficial interest for life in the fund. GREENWOOD *v.* GREENWOOD - - - - - 954

8. —— *Construction—Precatory Trust—Beneficial Gift.*] Testatrix gave all her personal estate to trustees upon trust, after payment of her funeral and testamentary expenses, debts, and legacies, to hold the residue "in trust for such of my nieces *A.* and *B.* as shall be living at my death, my desire being that they shall distribute such residue as they think will be most agreeable to my wishes." *A.* and *B.* both survived the testatrix :—*Held*, that they took the residue for their own benefit.—*Briggs* v. *Penny* (3 Mac. & G. 546) distinguished. STEAD *v.* MELLOR - 225

9. —— *Construction — Substitution — Words "Children of F. or their Issue.*] Testator, after giving his residuary personal estate to all and every the children of his uncle *F.* or their issue in equal shares, gave his real estate to *A.* for life, and after her death upon trust for sale, and to hold the proceeds upon trust for "all and every the children of *F.* or their issue in equal shares *per capita*." Four of the six children of *F.* were dead at the date of the will, and two survived the tenant for life :—*Held*, that the issue of the four deceased children of *F.* alive at the death of the testator or born during *A.*'s lifetime took as by substitution the shares of their deceased ancestors in the proceeds of the realty, the issue of each of the four taking, *inter se*, in equal shares. *In re* SIBLEY'S TRUSTS - - - - - 494

10. —— *Construction—Substituted Gift—Death before Date of Will.*] A testatrix directed that all her money should be equally divided between her brothers and sisters. Should any of them be dead their share to be equally divided amongst their children :—*Held*, that the children of a brother of the testatrix who was dead at the date of the will were entitled to a share. *In re* SMITH'S TRUSTS - - - - - - 497, n.

11. —— *Trustees—Investment Clause—"Stocks or Funds of Foreign Government"—Securities of the States of New York, Ohio, and Georgia.*] A power given by will to trustees to invest "upon any of the stocks or funds of the Government of the *United States of America*, or of the Government of *France*, or any other foreign government" :—*Held*, to authorize investment in *New*

WILL—*continued.*
York and *Ohio* stocks, and *Georgia* bonds. Cadett *v.* Earle - - - - - - 710
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See Charity. 1.
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—— "Children or their issue" - - 494
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—— "Children or their issue" - - 622
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WORDS—*continued.*
—— "Contract in writing" - - - 458
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—— "Stocks or funds of foreign governments"
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